SUPREME COURT, U.S.

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No. _____

In The

Supreme Court of the United States

October Term, 1995

MOOSE LODGE #259 (Salt Lake City) and
MOOSE LODGE #2103 (Tooele),

Petitioners,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,

Respondent.

**Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Utah**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether application of the Utah Civil Rights Act, which proscribes sex discrimination by entities holding state liquor licenses, to a private organization's membership practices unconstitutionally infringes on the rights of the organization's members to freedom of association.

2. Whether application of the Utah Civil Rights Act to condition the grant of a state liquor license upon the relinquishment of the rights of members of a private organization to freedom of association unconstitutionally deprives the members of such rights.

3. Whether the Utah Civil Rights Act is unconstitutionally overbroad because it sweeps within its scope constitutionally protected rights to freedom of association.

4. Whether a portion of the Utah Alcoholic Beverage Control Act which prohibits private clubs from being used for *any* violation of law or ordinance is unconstitutionally overbroad because it is susceptible to sweeping and improper application.

5. Whether a portion of the Utah Alcoholic Beverage Control Act is unconstitutionally vague because it fails to define prohibited conduct precisely and encourages arbitrary and discriminatory enforcement.

STATEMENT PURSUANT TO RULES 14.1(b) AND 29.1

All parties are named in the caption.

Petitioners are separate corporations, each organized and existing under the laws of the State of Utah. Petitioners, possessing charters legally granted by the Supreme Lodge of Moose International, Inc., are member lodges of Moose International, Inc., a corporation organized and existing under the laws of the state of Indiana.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, MOOSE LODGE #259 (Salt Lake City) and MOOSE LODGE #2031 (Tooele), request that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Utah, entered in the above-entitled action on October 23, 1995.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Utah is reported at 905 P.2d 1189 (Utah 1995), and is reprinted at Appendix 1. The Findings of Fact, Conclusions of Law and Order issued by the Utah Alcoholic Beverage Control Commission is unreported, and is reprinted at Appendix 61.

JURISDICTION

The opinion of the Utah Supreme Court was issued on October 23, 1995. No order for rehearing was sought by Petitioners or issued by the Utah Supreme Court. On January 11, 1996, Justice Stephen R. Breyer ordered that the time for filing this petition for writ of certiorari be extended through March 21, 1996. The jurisdiction of this Court to review the decision of the Utah Supreme Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions relevant to this case are the First, Fourteenth and Twenty-first Amendments to the United States Constitution.

The statutory provisions relevant to this case are UTAH CODE ANN. §§ 32A-5-101 to -108 (1991), UTAH CODE ANN. §§ 32A-4-101 to -207 (1991), selected portions of UTAH CODE ANN. § 32A-1-105 (1991), and UTAH CODE ANN. §§ 13-7-1 to -4 (1992).

As the provisions involved are lengthy, the pertinent text is set forth verbatim at Appendix 66-138.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

Moose International, Inc., (the **"Moose"**) is a tax exempt organization comprised of chartered lodges located throughout the United States. Petitioners are two such lodges operating in Utah as non-profit corporations.

The By-laws of Moose International, Inc., and the General Laws of the Supreme Lodge provide:

> Sec. 2.3 – *Order* – The word "Order" as used in these laws, and generally as used in the literature of Moose International, shall mean in the aggregate, all things existing and conducted by the member Lodges including the Supreme Lodge, Moose Legion, Women of the Moose, and all things in any way pertaining thereto, and does not signify any legal entity of any kind.

An "Order" includes (1) the Lodge (males over the age of 21); (2) the Women of the Moose (females over the age of 21 who are related to Moose members); and (3) the Home Chapter of the Women of the Moose (females over the age of 21 who are not related to Moose members). Only males can be members of Lodges and only males are allowed to participate in Lodge meetings and rituals.

The purposes of the Lodges, Chapters and other units of the Moose are:

> [T]o unite in the bonds of fraternity, benevolence and charity, all acceptable persons of good character; to educate and improve their members and the families of their members, socially, morally, and intellectually; to assist their members and their families in time of need; to aid and assist the aged members of the said Lodges, and their wives; to encourage and educate their

> members in patriotism and obedience to the laws of the country in which such Lodge or other units exist, and to encourage tolerance of every kind; to render particular service to orphaned or dependent children . . . ; and to serve aged members and their wives. . . .

Lodge membership is open only to males over the age of 21 who are not members of the Communist Party, have no felony convictions, have good moral character, and profess a belief in a Supreme Being. A prospective member must be sponsored by a member and endorsed by another member, both in good standing. A three-member committee reviews the application, thoroughly investigates the applicant and his family, and makes a recommendation to the Lodge officers. If the recommendation is unfavorable, the applicant is rejected and cannot reapply for six months. If it is favorable, the applicant is presented to the membership, with election by a majority vote. The qualifications and procedure are virtually identical for membership in the Women of the Moose and the Home Chapter of the Women of the Moose, except that these organizations are open only to females.

Ancillary to their benevolent activities, and consistent with all applicable rules and regulations of the Moose, Petitioners have established and maintained social quarters where members of the Order can purchase food and beverages for themselves and qualified guests. At all material times, members of the Women of the Moose and the Home Chapter of the Women of the Moose were considered qualified guests of the social quarters, but were not entitled to host guests in the social quarters. Adult family members and "ladyfriends" of Lodge members and prospective members of the Lodge were also considered qualified guests. However, the social quarters were not open to the public.

Petitioners, which are comprised solely of males, each applied for and obtained state-issued private club

liquor licenses for their social quarters by the state of Utah pursuant to UTAH CODE ANN. §§ 32A-5-101 to -108. In accordance with UTAH CODE ANN. § 32A-5-103, only Petitioners' members can be voting members and serve as officers or directors of the private liquor club.

In order to qualify for private club liquor licenses, Petitioners must be private, non-profit corporations, UTAH CODE ANN. §§ 32A-5-105(2)(a) and 32A-5-107(27); must have eligibility standards for membership, membership limitations consistent with the association's nature, and provisions for guests or visitors, UTAH CODE ANN. § 32A-5-102(3)(b); may admit members only on written application and approval by a quorum of members, UTAH CODE ANN. § 32A-5-107(2); may allow guests or visitors to use the premises only when previously authorized by a member, UTAH CODE ANN. § 32A-5-107(5); and must not advertise, UTAH CODE ANN. § 32A-5-107(23). No such requirements are required for *public* liquor licensees.

II. COURSE OF THE PROCEEDINGS.

On April 14, 1993, the Utah Supreme Court issued its opinion in *Beynon v. St. George-Dixie Lodge #1743*, 854 P.2d 513 (Utah), *cert. denied*, 114 S.Ct. 195 (1993), holding that all state liquor licensees are "entities regulated by the state" subject to the Utah Civil Rights Act ("**UCRA**"), UTAH CODE ANN. §§ 13-7-1 to -4.

On July 2, 1993, the Department of Alcoholic Beverage Control (the "**DABC**") issued a directive notifying all private club licensees of the decision in *Beynon* and instructing them to (1) submit copies of their articles of incorporation and by-laws to the DABC; (2) attest that they did not discriminate on the basis of race, color, sex, religion, ancestry, or national origin; and (3) attest that their articles of incorporation and by-laws contained no discriminatory language. Each Petitioner responded to the directive. Upon reviewing Petitioners' responses, the

DABC determined that Petitioners violated UCRA because Petitioners' by-laws precluded women from full membership in the entity which held the private club liquor license. On August 19, 1993, the DABC issued a Notice of Agency Action & of Formal Adjudication and Notice of Hearing to each Petitioner with respect to the DABC's findings, recommending revocation of Petitioners' private club liquor licenses.

On November 19, 1993, the Utah Alcoholic Beverage Control Commission (the **"Commission"**) held a revocation hearing. At the hearing, the DABC presented no evidence that Petitioners in fact discriminated on the basis of gender, but sought revocation premised solely upon the language in Petitioners' by-laws and articles of incorporation which the DABC found to be discriminatory. Petitioners challenged the proposed revocation on several bases, including violation of their members' rights to freedom of association pursuant to the First and Fourteenth Amendments to the United States Constitution and the vagueness and the overbreadth of the pertinent statutes.

On January 28, 1994, after further briefing and argument, the Commission suspended Petitioners' liquor licenses indefinitely, effective February 25, 1994, and denied their motion to stay enforcement of that order. On February 25, 1994, the Commission denied Petitioners' renewed stay motion. On that same day, Petitioners filed a petition for review with the Utah Court of Appeals, which petition was transferred to the Utah Supreme Court. On March 21, 1994, the Utah Supreme Court denied Petitioners' motion for stay pending plenary review.

In original proceedings before the Utah Supreme Court, Petitioners argued, *inter alia*, that (1) because Petitioners are private entities under criteria set forth by the United States Supreme Court, their members have constitutionally protected association rights; (2) UCRA violates

the United States Constitution when it purports to regulate the membership practices of private entities based upon their receipt of private club liquor licenses; (3) UCRA is unconstitutional as applied to Petitioners to the extent that it conditions receipt of a state privilege – a private club liquor license – upon relinquishment of Petitioners' members' constitutionally protected association rights; and (4) Utah's liquor laws are unconstitutionally vague and overbroad, both facially and as applied.

On October 23, 1995, the Utah Supreme Court issued its opinion, concluding:

> [W]e conclude that the state's interest in ending gender-based discrimination outweighs the protection the state needs to offer petitioners regarding their right of association. App. 17.
>
> Citizens in Utah may purchase liquor only through state liquor stores (where no consumption is allowed), at licensed private clubs, or at licensed restaurants. That makes discrimination by these clubs more egregious because it lessens the availability of certain classes of persons to purchase liquor for consumption for themselves or guests. In other words, if we were to hold that all private clubs were allowed to discriminate against groups protected by UCRA, it could theoretically result in the total exclusion of these groups from important social opportunities. App. 22.
>
> Petitioners, by voluntarily applying for a liquor license, have agreed to become one of the relatively few organizations in this state allowed to dispense liquor. To possess such a license is to perform a quasi-public service to the extent that members of the public in this state can purchase liquor only through regulated licensees. To that end, although petitioners are private organizations apart from the liquor club within each

> lodge and are entitled to the constitutional protection afforded all private entities, by voluntarily accepting the role of DABC licensee, they acquire a quasi-public status whenever engaged in the buying or selling of alcohol. App. 23.
>
> Having made the decision to accept a liquor license, . . . the Moose have voluntarily surrendered a portion of their private status. By entering the public sphere, albeit in a limited fashion, they have *voluntarily* surrendered the right of private discrimination on prohibited grounds. (Emphasis in original.) App. 25.
>
> [T]he Moose . . . may very well be allowed to discriminate in their private meetings. However, where they seek to operate a state-licensed liquor club, the state is permitted to enforce its civil rights act. App. 27.
>
> Because petitioners have made no showing, either legally or factually, to support their contention that the language of the challenged Utah statute is subject to arbitrary enforcement or to differing but reasonable interpretations, we hold that the language is not unconstitutionally vague. App. 30.
>
> Because the statute in question proscribes club licensees only from allowing activities that are already illegal from taking place on their premises, it does not sanction *any* protected behavior. . . . [T]he language in Utah's statute is not so broad as to either risk arbitrary enforcement or sanction protected behavior. (Emphasis in original.) App. 30.

Based upon the foregoing, the Utah Supreme Court affirmed the Commission's decision to suspend Petitioners' private club liquor licenses.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THIS PETITION TO DETERMINE THE SCOPE OF THE ASSOCIATIONAL RIGHTS OF MEMBERS OF DISTINCTLY PRIVATE ORGANIZATIONS, AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court has long recognized freedom of association as a fundamental right protected by the First Amendment. *See NAACP v. Alabama*, 357 U.S. 449 (1958). While the right was initially analyzed as an extension of free speech, the Court gradually broadened the contours to protect "forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

The principle that members of private organizations enjoy constitutionally protected association rights was succinctly stated by Justice Douglas in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1971):

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

407 U.S. at 180 (DOUGLAS, J., dissenting on other grounds).

In a trilogy of cases decided in the 1980's, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), this Court addressed the conflict between the constitutional rights of association relied on by private

organizations and the rights of individuals to be free from discriminatory membership practices of those organizations.

In *Roberts*, the Jaycees argued that it was not a "place of public accommodation" within the meaning of the Minnesota Human Rights Act and that application of the Act violated its members' association rights. In establishing a framework for analyzing future claims of associational freedom, the Court identified two distinct areas of constitutionally protected freedom of association: freedom of intimate association and freedom of expressive association. 468 U.S. at 617.

Analyzing the right of intimate association, the Court recognized that choices concerning certain intimate human relationships must be free from "undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617-18. The Court identified the distinguishing characteristics of such an association as "relative smallness, a high degree of selectivity in the decision to begin and maintain an affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620.

The Court concluded that the Jaycees did not meet the criteria for protected intimate association, finding that the local chapters were large and unselective, employed no criteria for judging applicants for membership, and routinely recruited and admitted new members with no inquiry into their backgrounds. The Court also found that many of the activities central to the formation and maintenance of the association involved the participation of strangers of both genders. *Id.* at 621.

Turning to the freedom of expressive association, the Court acknowledged that the right to engage in activities protected by the First Amendment implies a "corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational,

religious, and cultural ends." *Id.* at 622. While the right to associate for expressive purposes is not absolute, infringements on the right may be justified only by regulations which "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623. The Court went on to hold in *Roberts* that the state's compelling interest in eradicating discrimination against its female citizens, an interest unrelated to the suppression of expression, justified the impact that application of the Act to the Jaycees may have on its male members' freedom of expressive association. *Id.*

In *Rotary*, the issue was whether the classification of individual Rotary Clubs as "business establishments" subject to the anti-discrimination provisions of the Unruh Act unconstitutionally infringed on the club members' associational rights. The Court reiterated that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." 481 U.S. at 545. Applying the criteria set forth in *Roberts*, the Court held that in view of the potentially large size of local clubs, the attrition among club members, the emphasis on recruiting, the inclusive nature of each club's membership, the public purposes behind the clubs' service activities, the participation of strangers in many of the clubs' central activities, and media coverage of their activities, the relationship among Rotary Club members was "not the kind of intimate or private relation that warrants constitutional protection." *Id.* at 547.

Citing *Roberts*, the Court again recognized that the right to engage in First Amendment activities implies "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," but held that application of the Unruh Act to the clubs did not violate their First

Amendment right of expressive association since admitting women would not affect in any significant way the existing members' ability to carry out their activities or require the clubs to abandon or alter their classification and admission systems. *Id.* at 548. The Court further held that some "slight infringement" of members' rights of expressive association would be justified because of the State's compelling interests in eliminating discrimination against women and in assuring them equal access to public accommodations. *Id.* at 549.

In *New York State Club Association*, a consortium of private clubs challenged the constitutionality of a provision of the New York Human Rights Law which *per se* defined as a "place of public accommodation" any membership organization that had more than four hundred members, provided regular meal service, and regularly received payment for dues and other fees from or on behalf of nonmembers for the furtherance of trade or business. 487 U.S. at 6.

Focusing on the size of the clubs, their commercial characteristics, and the role of strangers in their ordinary existence, the Court, citing *Roberts* and *Rotary*, held that the Law could be constitutionally applied to at least some of the large clubs. *Id.* at 12. While conceding that "there may be clubs that would be entitled to constitutional protection despite the presence of these characteristics, . . . " the Court concluded that "it cannot be said that Local Law 63 is invalid on its face because it infringes the private associational rights of each and every club covered by it." *Id.* The Court used similar reasoning to hold that while a club might be able to show that it was "organized for specific expressive purposes" and would not be able to advocate its desired viewpoints as effectively if it could not confine its membership to those of the same sex, many of the clubs covered by the Law could not, thus defeating the clubs' facial attack. *Id.* at 13.

Roberts, Rotary and *New York State Club Ass'n* provide general guidance for determining the scope of the intimate and expressive rights of association of the members of private organizations. However, this Court has not yet established a definitive test for determining the associational rights of members of private organizations under circumstances such as those presented by the instant case. Indeed, the Court has explicitly and consistently declined to extend its rulings beyond the narrow facts presented by each case.

In *Roberts*, the Court read the reference to the Kiwanis Club, which had a formal procedure for choosing members on the basis of selective criteria, as "simply providing a further refinement of the standards used to determine whether an organization is 'public' or 'private'," but declined to consider "the extent to which such groups may be entitled to constitutional protection from the operation of the Minnesota Act." 468 U.S. at 630.

In *Rotary*, the Court again limited its holding, stating that it had no occasion in that case to consider the extent to which the First Amendment "protects the right of individuals to associate in the many clubs and other entities with selective membership that are found throughout the country." 481 U.S. at 547-48 n. 6. Notwithstanding such limitations, in both *Roberts* and *Rotary* the Court expressly acknowledged that freedom of intimate association was not restricted to relationships among family members. *Roberts*, 468 U.S. at 618-620; *Rotary*, 481 U.S. at 545-46.

Similarly in *New York State Club Ass'n*, the Court acknowledged that there might be organizations within the description of the subject law whose members' associational rights might be deserving of constitutional

protection, 487 U.S. at 12-14,[1] but in the absence of specific evidence in that record regarding the intimate or expressive characteristics of *any* covered club, the Court declined to indicate how or when a club might be able to make such a showing.[2] *Id.*

The Utah Supreme Court concedes that Petitioners are "private organizations apart from the liquor club within each lodge and are entitled to the constitutional protection afforded all private entities." App. 23. The Utah court further acknowledges that Petitioners "may very well be allowed to discriminate in their private meetings." App. 27. However, despite Petitioners'

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[1] Indeed, Justice O'Connor indicated in her concurrence that "a club with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence." 487 U.S. at 19 (O'Connor, J., concurring).

[2] Lower courts have noted the lack of guidance from this Court in delineating how far constitutional protection extends beyond family relationships. *See, e.g., Vieira v. Presley*, 988 F.2d 850, 852 (8th Cir. 1993) (Between clearly protected area of family relationships and relationships with insufficient intimacy to allow constitutional protection lies broad range of human relationships that may claim constitutional protection. "The gray area between the poles is as yet uncertain."); *Pacific-Union Club v. Superior Court*, 283 Cal. Rptr. 287, 293-94 (Cal. App. 1 Dist. 1991) (At some point, relationships lose degree of intimacy sufficient to invoke constitutional protection. "The United States Supreme Court has declined to map this middle ground with precise benchmarks."); and *State v. Burning Tree Club, Inc.*, 554 A.2d 366, 378 (Md.), *cert. denied*, 493 U.S. 816 (1989) (Supreme Court has neither precisely defined scope of freedom of intimate association nor delineated relationships which enjoy protection. "How far the protection extends beyond familial relationships is unclear.")

"decidedly private" status, App. 42, the Utah court states that Petitioners "are not entitled to the degree of constitutional protection they claim." App. 25.

The Utah court's holding requires an answer to the discrete question left unresolved in this Court's previous rulings: What is the scope of the constitutional protection afforded members of all private entities? This case presents an excellent opportunity for this Court to fashion an appropriate standard within the analytical framework constructed in *Roberts, Rotary and New York State Club Ass'n*. The following materials in this Section I demonstrate the unconstitutional results that obtain absent a more definitive statement from this Court on the scope of the rights to freedom of association.

A. UCRA Unconstitutionally Includes Within the Scope of its Anti-Discrimination Provisions the Association Between Members of Private Entities.

From their inception, statutes prohibiting discrimination in places of public accommodation have *not* been applied to the membership policies of truly private entities such as Petitioners. During the congressional debates leading to the adoption of the Fourteenth Amendment to the United States Constitution and the original federal Civil Rights Acts, the drafters drew a clear distinction between a person's "civil rights" and his or her "social rights," perceiving the right of nondiscriminatory access to places of *public* accommodation as a fundamental civil right, but acknowledging that protection against discrimination could not grant access to a person's home, *private* club or, in general, to "social relations." *See Bell v. Maryland*, 378 U.S. 226, 293-94 (1964) (GOLDBERG, J., concurring).

In enacting the public accommodation provisions of the Civil Rights Act of 1964, Congress specifically

excluded private clubs from the scope of the statute. 42 U.S.C. § 2000a(e). The legislative history of the 1964 Act clearly manifests that Congress doubted the constitutionality of legislation which *did not* exempt private clubs. *See, e.g.*, H. REP. NO. 914, 88th Cong., 2d Sess. ___ (1964) (Minority Report), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2459-62; 110 CONG. REC. 2293 (1964) (remarks of Rep. Long). Supporters of the Act responded that "where freedom of association might logically come into play as in cases of private organizations, title II quite properly exempts *bona fide* private clubs. . . . " H. REP. NO. 914, 88th Cong., 2d Sess. ___ (1964) (Additional Views), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2495. *See also* 110 CONG. REC. 6008, 6534 (1964) (remarks of Sen. Humphrey).

Public accommodation statutes enacted by many states explicitly exempt from their application truly private entities such as Petitioners.[3] And in the absence of an explicit statutory exemption, courts in other jurisdictions have construed their statutes to exclude private organizations.[4]

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[3] *See, e.g.* FLA. STAT. ANN. § 760.07 (West Supp. 1996) (lodge halls); MONT. CODE ANN. § 49-3-204(2) (1995) (lodge of a recognized national fraternal organization); HAW. REV. STAT. § 489-2(5) (Michie 1995) (private clubs selling liquor to members and guests); NEW YORK EXEC. LAW § 292(9) (McKinney 1993 and Supp. 1996) (benevolent orders); WASH. REV. CODE § 49.60.040 (West 1990) (fraternal organizations).

[4] *See, e.g., Warfield v. Peninsula Golf & Country Club*, 42 Cal. Rptr. 2d 50, 64 (Cal. 1995) (nothing in the language or history of the Unruh Civil Rights Act indicates the Legislature intended to bring membership decisions of truly private clubs within reach of the statute); *United States Jaycees v. McClure*, 305 N.W. 2d 764, 771 (Minn. 1981) (private associations which are selective in membership are unaffected by [the Minnesota public accommodations statute]).

UCRA explicitly exempts "any institution, . . . club, or place of accommodation which is in its nature distinctly private except to the extent that it is open to the public." UTAH CODE ANN. § 13-7-2(1). While clearly exempting entities such as Petitioner that are truly private, but then including such organizations as "entities regulated by the state" as stated in UTAH CODE ANN. § 13-7-2(3)(b), the statute internally and inconsistently deprives members of private entities of their constitutionally protected associational rights.

Like New York City, the state of Utah has invoked a *per se* rule to determine when private entities may be subject to its anti-discrimination laws: if an organization possesses a state liquor license, it is automatically a public entity. However, in contrast to the clubs represented by the petitioner in *New York State Club Ass'n*, the intimate and expressive characteristics of these Petitioners *are* before the Court and provide an excellent factual opportunity for this Court to determine that Utah's *per se* rule cannot be applied constitutionally to members of truly private organizations such as Petitioners. The Court should take the opportunity because the intimate and expressive associational rights of the members of Petitioners have been unconstitutionally destroyed.

1. Petitioners are private organizations whose members are entitled to freedom of intimate association, despite petitioners' possession of private club liquor licenses.

This Court has long recognized that to secure individual liberty, the Bill of Rights must "afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts*, 468 U.S. at 618. "[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by

cultivating and transmitting shared ideals and beliefs." *Id.* at 618-619. These bonds "foster diversity and act as critical buffers between the individual and the power of the State." *Id.* at 619.

The *Roberts* opinion described a qualitative continuum of personal relationships, from the most intimate and protected – family relationships – to the most attenuated and least protected – large business enterprises. 468 U.S. at 620. Between the poles, however, "lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State." *Id.* Factors that may be relevant to determine where a particular association falls in the continuum "include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.*[5] Whether the First Amendment "zone of privacy" extends to a particular entity "requires a careful inquiry into the objective characteristics of the particular relationships at issue." *Rotary*, 481 U.S. at 547-48 n.6.

The Utah court's characterization of the Petitioners as large, unselective drinking clubs is contrary to the true nature of the association of Petitioners' members. As noted by one court, "[t]ruly fraternal organizations attempt to replicate the bonds of literal fraternity; the relationship among members is close, intimate, and continuing." *Cornelius v. Benevolent Protective Order of Elks,*

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[5] "Pertinent factors" identified by various courts include (a) selectivity; (b) formal membership procedures; (c) degree of membership control over internal governance; (d) the organization's history; (e) the use of facilities by non-members; (f) the amount of dues; (g) advertising; (h) whether the club is nonprofit or for profit. *See e.g., Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1494 n. 16 (5th Cir. 1995); *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1276 (7th Cir. 1993); *U.S. v. Lansdowne Swim Club*, 894 F.2d 83, 85 (3d Cir. 1990).

382 F. Supp. 1182, 1202 (D. Conn. 1974). "Its members having genuinely chosen each other as social intimates, the club functions as an extension of their homes." *Id.*[6]

Such is the case here. As local lodges, Petitioners are relatively small.[7] Members choose to associate with one another based on congeniality and specific membership criteria. Only members and a limited class of guests are allowed in the social quarters. Most importantly, no non-members are allowed to participate in lodge meetings or rituals, "the critical aspects of the relationship." *Cf. Roberts*, 468 U.S. at 620.[8] This practice is in stark contrast to that of the Rotary Clubs, which "seek to keep their

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[6] *See New York State Club Ass'n*, 487 U.S. at 18, recognizing that benevolent orders are "different in kind, at least in the crucial respect of whether business activity is prevalent among them," from the downtown businessmen's clubs in that case. "[B]enevolent orders are organized under the relevant law 'solely for the benefit of [their] membership and the beneficiaries,' and thus are not 'public' organizations." *Id.* at 17. As Justice Scalia put it: "A lodge is not likely to be a club where men dine with clients and conduct business." *Id.* at 21 (Scalia, J., concurring).

[7] *Roberts* rightly focused on size of local chapters, rather than the national membership. 468 U.S. at 621. *See also Pacific-Union Club v. Superior Court*, 283 Cal. Rptr. 287, 294 (Cal. App. 1 Dist. 1991) (club with fixed local membership of 760 held to be private); *Louisiana Debating and Literary Ass'n*, 42 F.3d at 1483 (clubs with fixed local memberships of 500, 325, 350 and 600 members held to be private). *Cf. Welsh v. Boy Scouts*, 993 F.2d at 1276 (Boy Scouts, with over 5 million members, not a public accommodation under Title II, 42 U.S.C. § 2000.)

[8] *See also Louisiana Debating and Literary Ass'n*, 42 F.3d at 1497-98 (relatively small clubs which maintained atmosphere of comradery and congeniality employing restrictive guest and admission policies were "organizations whose location on the spectrum of personal attachments places them near those that are 'most intimate'. Accordingly, they enjoy the fullest protection of their right of private association.")

'windows and doors open to the whole world.' " *Rotary*, 481 U.S. at 547. Certainly Petitioners are private within the ordinary meaning of that term, as construed by this Court. *See Irvis*, 407 U.S. at 175. In upholding UCRA's constitutionality, the Utah court conceded that Petitioners are private organizations, but concluded that Petitioners' receipt of a state private club license somehow thrust them into the public sphere.[9] This result is fundamentally at odds with the contrary principles stated in *Roberts* and *Irvis*.[10]

The Utah court held that Petitioners have attained a "quasi-public" status because members of the public in the state of Utah can purchase liquor only through regulated licensees. However, the court glossed over the fact that UTAH CODE ANN. § 32A-4-101 to -207 provides for **public** liquor licenses (in numbers nearly twice as great as private club licenses) for restaurants, hotels and airport lounges – clearly "public accommodations" within the scope of UCRA. No group or class of persons is impeded from entertaining business clients or personal friends in these establishments. Citizens of Utah may also obtain liquor from state-licensed liquor stores, UTAH CODE ANN. § 32A-2-101, and package agencies, UTAH CODE ANN. § 32A-3-101, and beer from on-premise beer

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[9] *Compare* UCRA *with* CAL. BUS. & PROF. CODE § 23425 (West 1985), which does not require a nationally affiliated lodge to adhere to a policy of nondiscrimination to obtain a liquor license.

[10] In *Irvis*, this Court concluded that a state liquor license could not transform a private licensee into a public or state entity. 407 U.S. at 173. As Justice Douglas noted, a private club's receipt of a governmental permit "does not make it *ipso facto* a public enterprise or undertaking, any more than the grant to a householder of a permit to operate an incinerator puts the householder in the public domain." 407 U.S. at 180 (Douglas, J., dissenting on other grounds).

retailers, UTAH CODE ANN. § 32A-10-101. The point is that in Utah, private clubs are statutorily distinguished from public liquor licensees; there is no statutory basis for making Petitioners "quasi-public."

Although the number of private club licenses is limited in Utah, when the availability of liquor from restaurants, hotels, state liquor stores and other retail licensees is considered, Utah's Alcoholic Beverage Control Act "falls far short of conferring upon club licensees a monopoly in the dispensing of liquor in any given municipality or in the State as a whole." *See Irvis*, 407 U.S. at 177. Thus, the Utah court's premise that protecting Petitioners' members' association rights could "permit exclusion of a significant portion of the community from important social activities that accompany the regulated sale and consumption of liquor," App. 22, is plainly flawed, both factually and legally.

As members of genuinely private entities, Petitioners' members have substantial intimate association rights which warrant constitutional safeguards.

2. Petitioners' members are entitled to protection of their expressive association rights.

Freedom of expressive association is protected as an "indispensable means of preserving" the liberty to associate to engage in "those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618. This freedom embodies a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* at 622. Protecting collective efforts to achieve shared goals "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Id.*

"The right of 'association,' . . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group. . . . " *Griswold*, 381 U.S. at 483. While a right of expressive association is not expressly included in the First Amendment, "its existence is necessary in making the express guarantees fully meaningful." *Id.*

As Justice O'Connor noted in Roberts, a broad range of activities may be expressive.

> It is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young and community service . . . [P]articipation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self improvement.

Roberts, 468 U.S. at 636 (O'CONNOR, J. concurring).

Petitioners' specific associational purposes involve precisely the expression described by Justice O'Connor. While Petitioners' members may not be "strident, contentious, or divisive," their expressive association rights merit constitutional protection.

3. UCRA does not serve a compelling state interest by using the least restrictive means.

UCRA's infringement on Petitioners' associational rights may be justified only if the legislation serves "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of free speech or associational freedoms." *Roberts*, 468 U.S. at 623. If the state of Utah has open to it a "less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that

broadly stifles the exercise of fundamental personal liberties." *Elrod v. Burns*, 427 U.S. 347, 363 (1976). "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Id.* at 362.

Petitioners agree that "assuring women equal access to the goods, privileges and advantages of a place of public accommodation clearly furthers compelling state interests." *Roberts*, 468 U.S. at 610. Petitioners also recognize that under different circumstances than those of the present case, membership organizations that are nominally private are in fact places of public accommodation which offer such goods, privileges and advantages to their members. For example, in *Roberts*, the court held that "[l]eadership skills are 'goods,' [and] business contacts and employment promotions are 'privileges' and 'advantages'. . . . " *Id.* at 626. *See also Rotary*, 481 U.S. at 549. And in *New York State Ass'n*, the Court acknowledged the interest of the City of New York in providing an "equal opportunity to participate in the business and professional life of the city" to all its citizens. 487 U.S. at 5.

In the present case, however, there has been no showing that Petitioners are "places of public accommodation." Nor is there any support in the record for the notion that Petitioners accord any of the subject privileges or advantages to their members, or that membership in Petitioners is essential to participation in business or professional opportunities in their respective communities.[11] In summary, the state of Utah has no compelling

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[11] *See, e.g., Louisiana Debating and Literary Ass'n*, 42 F.3d at 1494:

> Obviously, business benefit might spring from any association, meeting, or encounter. It is well known that ofttimes it is "not what you know, but who you

interest justifying infringement of the associational rights of Petitioners' members.

Furthermore, it is difficult to imagine how a statute construed to be aimed at the gender-based membership policies of otherwise private organizations can be ideologically neutral. The whole ideological basis of a private fraternal organization is the brotherhood of men – not the siblinghood of persons. UCRA unconstitutionally attempts to "prescribe orthodoxy" for the membership of concededly private entities. *See e.g., Wooley v. Maynard*, 430 U.S. 705, 716-17 (1977).[12]

While it may be the view of members of our society that gender-based discrimination is unacceptable, the First Amendment protects objectionable viewpoints as well as popular ones. "First Amendment safeguards are not reduced in magnitude by the prevailing political and social judgment on the beliefs or practices which are entitled to their protection." *Pacific-Union Club v. Superior Court*, 283 Cal. Rptr. 287, 299 (Cal. App. 1 Dist. 1991). *See Healy v. James*, 408 U.S. 169, 187-88 (1972); *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 124 (1981).

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know"; and people often prefer, in any event, to do business with friends or acquaintances. But this fact alone cannot be the basis for whether a club receives private association protection under the First Amendment. If it were, no club could be private for purposes of that protection.

[12] In *Maynard*, the Court struck down a requirement that a dissenting citizen bear the state slogan, "Live Free or Die," on his automobile license-plate. The purpose of the motto was to "promote appreciation of history, individualism, and state pride." *See also West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 (1943) (Court found compulsory flag saluting ceremony violated school children's right to be free from "compulsion . . . to declare a belief." Flag salute sought to engender "national unity".)

While seeking to eradicate invidious discrimination in places of public accommodation – a laudable goal – Utah has employed a scattergun approach which infringes impermissibly on the rights of members of truly private entities, rather than the precision of regulation required by this Court. As noted in *Roberts*,

> [t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.

468 U.S. at 623.

Imposing anti-discrimination legislation on private benevolent fraternal organizations having the intimate and expressive characteristics of Petitioners advances no articulable social policy, let alone a compelling state interest. In Utah liquor is equally available to men and women through public accommodations, which is the least restrictive way of serving whatever interest the State may have in providing its citizens the opportunity to consume alcohol socially.

B. UCRA Violates Petitioners' Members' Freedom of Association Rights by Conditioning a State Privilege on the Relinquishment of Those Rights.

> [T]his Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his

> constitutionally protected interests – especially, his interest in freedom of speech.[13]

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

The Utah court broadly states that by accepting a liquor license, Petitioners have "voluntarily surrendered a portion of their private status." App. 25. Such a conclusion has been soundly rejected by this Court. "The difficulty with this argument is that it completely swallows the rule." *Elrod*, 427 U.S. at 359 n.13. Since the state of Utah could not otherwise infringe on Petitioners' association rights, to accept the argument that Petitioners voluntarily relinquished their rights is to say that "the government may do what it may not do." *Id.*[14]

There are two distinct powers relevant to the analysis. One power – the power to regulate the sale and consumption of liquor in proper cases – the state possesses; and the other – the power to compel a private

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[13] The Court has invalidated such unconstitutional bases with respect to welfare benefits, *Shapiro v. Thompson*, 394 U.S. 618 (1969); unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398 (1963); tax exemptions, *Speiser v. Randall*, 357 U.S. 513 (1958); public employment, *Perry v. Sindermann*, 408 U.S. 593 (1972); bar admissions, *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); and mailing privileges, *Blount v. Rissi*, 400 U.S. 410 (1971). "In all of the cases, citizens were left free to exercise their constitutional rights so long as they were willing to give up a 'gratuity' that the State had no obligation to provide." *California v. LaRue*, 409 U.S. 109, 137 (1972) (MARSHALL, J. dissenting).

[14] This Court has never held that a party's consent could cure a statute that otherwise violated the First Amendment. *Cf. Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 225, n. 15 (1989). *See also G&V Lounge, Inc., v. Michigan Liquor Control Commission*, 23 F.3d 1071, 1077-78 (6th Cir. 1994) (state cannot constitutionally condition receipt of a benefit, such as a liquor license, on an agreement to refrain from exercising one's constitutional rights – purported "waiver" unenforceable.)

male club to accept female members – the state does not possess. Any attempt to exert the latter is certainly unconstitutional. But can the state obtain the same result by imposing conditions pursuant to the former?

> If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion.

Frost & Frost Trucking Co. v. Railroad Commission of California, 271 U.S. 583, 593 (1926).

According to the Utah court, Petitioners can choose to obtain a liquor license and give up their private status, or to relinquish their liquor licenses and maintain their private status. In reality, Petitioners are given a choice only "between the rock and the whirlpool, – an option to forego a privilege which may be vital to [their] livelihood or submit to a requirement which may constitute an intolerable burden." *Id.*

The Utah court suggests that Petitioners could easily address their "problem" by forming separate corporations which comply with UCRA to hold the liquor licenses. App. 41. That might well have been the easier course. But, as the Fifth Circuit has noted, "the easier course is not the required course; were it so, this would be a far different Nation." *Louisiana Debating and Literary Ass'n*, 42 F.3d at 1500. And as a member of this Court once observed, "[w]e have now passed well beyond the day when illusory escape hatches could justify the imposition of burdens on fundamental rights." *Moore v. City of East Cleveland*, 431 U.S. 494, 513 (1977) (BRENNAN, J., concurring).

Notwithstanding the Utah court's view that UCRA's burden upon Petitioners is not substantial, the state of Utah may not condition Petitioners' receipt of a private

club liquor license upon the relinquishment of their members' constitutionally protected association rights. Since the state may not seek an unlawful end either directly or indirectly, "the inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated." *Elrod*, 427 U.S. at 360. "Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Id.*

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost, 271 U.S. at 593-594. This Court should not tolerate such a result in this case.

C. The Twenty-first Amendment Does Not Empower the State of Utah to Abrogate the Associational Rights of Members of Private Entities.

This Court's decisions have confirmed that the Twenty-first Amendment was primarily designed to create an exception to the normal operation of the Commerce Clause. *See Craig v. Boren*, 429 U.S. 190, 206 (1976). "[B]eyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." *Id.* As one commentator has observed: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights . . . where the sale or use of liquor is concerned." P. Brest, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS, 358 (1975). The Court's decisions have never gone so far as to hold that the Twenty-first Amendment supersedes all other provisions of the United States Constitution with respect to

liquor regulation and consumption. *California v. LaRue*, 409 U.S. 109, 115 (1972). *See also Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

While state regulation of liquor is important, First Amendment values are paramount. "Indeed, in the past they have been thought so important as to provide an independent restraint on every power of Government." *LaRue*, 409 U.S. at 135 (MARSHALL, J., dissenting). The state of Utah should likewise be restrained from abrogating Petitioners' members' associational rights on the basis of some notion that the provisions of the Twenty-first Amendment are superior.

II. THE COURT SHOULD GRANT THIS PETITION TO DETERMINE WHETHER PROVISIONS OF UCRA AND THE ALCOHOLIC BEVERAGE CONTROL ACT ARE OVERBROAD AND VAGUE.

A statute is constitutionally overbroad if, in addition to proscribing activities which may be prohibited, it also sweeps within its coverage speech or conduct which is constitutionally protected. *See Thornhill v. Alabama*, 310 U.S. 88 (1940). Statutes which readily lend themselves "to harsh and discriminatory enforcement" can deter the exercise of First Amendment rights. *Id.* at 97. Overbreadth poses the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible to sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

By including truly private clubs such as Petitioners within its scope, UCRA does not "aim specifically at evils within the allowable area of state control," but, rather "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." *Thornhill*, 310 U.S. at 97.

In addition, in this case, the Commission revoked Petitioners' private club liquor licenses on the authority

of UTAH CODE ANN. § 32A-5-105(2)(c), which requires that a private club include a statement in its bylaws that the club will not be used for "permitting gambling or any other violation of law or ordinance."[15] Authorizing the Commission to suspend or revoke liquor licenses based on that clause gives the Commission unreasonably broad power potentially both to interpret and enforce *every* state law with respect to state liquor licensees, regardless of whether such laws have any relationship to the control of alcoholic beverages. Section 32A-5-105(2)(c), especially when coupled with UCRA, is thus clearly susceptible to sweeping and improper application. Both statutes are substantially overbroad and therefore unconstitutional.

The void-for-vagueness doctrine, also applicable here, requires that a statute define the offense with sufficient precision that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The doctrine reflects the principle that a statute which is so vague that persons of "common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Roberts*, 468 U.S. at 629.

UTAH CODE ANN. § 32A-5-105(2)(c) is unconstitutionally vague in that it fails to define proscribed conduct

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[15] Note the similarity between UTAH CODE ANN. § 32A-5-105(2)(c) and Section 5-48(b) of the Atlanta Code of Ordinances, which provided for revocation of a liquor license for the violation of any state or federal law or city ordinances. In *Atlanta Attractions, Inc., v. Massell*, 330 F. Supp. 865, 866 (N.D. Ga. 1971), *aff'd*, 463 F.2d 449 (5th Cir. 1972), the court struck down the Atlanta ordinance, stating: "[t]hat portion of Section 5-48 of the Atlanta Ordinances which permits the revocation of a liquor license for the violation of *any* state law suffers from "overbreadth" and must be struck as unconstitutional."

with sufficient precision that ordinary people can understand what conduct is prohibited and in that it encourages arbitrary and discriminatory enforcement. As demonstrated by the facts of this case, the statute empowered the Commission to wield its authority in an arbitrary and discriminatory manner without regard for the constitutional rights protected by this Court.

As this Court has emphasized, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Button*, 371 U.S. at 438. "[S]tandards of permissible statutory vagueness are strict in the area of free expression." *Id.* at 433. UTAH CODE ANN. § 32A-5-105(2)(c) fails to meet the strict standards set forth by this Court. The Court should take this opportunity to prescribe statutory guidelines sufficiently narrow in scope to protect the exercise of First Amendment freedoms.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant this petition for a writ of certiorari to review the decision of the Supreme Court of the State of Utah.

Respectfully submitted this 21st day of March, 1996.

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IN THE SUPREME COURT OF THE STATE OF UTAH

Elks Lodges #719 (Ogden) and #2021 (Moab),

Petitioners

v.

Department of Alcoholic Beverage Control,

Respondent

No. 940105

Moose Lodges #259 (Salt Lake City) and #2031 (Tooele),

Petitioners

v.

Department of Alcoholic Beverage Control,

Respondent

No. 940197

FILED

October 23, 1995

Original Proceeding in this Court

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DURHAM, Justice:

This case is a consolidation of separate petitions filed by two Elks lodges and by two Moose lodges, both seeking review of orders of the Department of Alcoholic Beverage Control Commission. Because petitioners raise identical claims, we consider them together. Differences between petitioners will be discussed in the analysis portion of this opinion.

I. FACTS AND PROCEDURE BELOW

On August 19, 1993, the Commission of the Division of Alcoholic Beverage Control (DABC) served notice on twelve Elks lodges, two Moose lodges, and two other private clubs that the organizations, each of which possessed a private club liquor license issued pursuant to Utah Code Ann. §§ 32A-5-101 to -108, would be subject to formal DABC action for failing to comply with agency directives prohibiting discrimination on the basis of gender. These directives provided that clubs discriminating in their membership policies would not be allowed to maintain state liquor licenses. The DABC issued these directives to clubs which it believed to be practicing illegal discrimination after this Court's decision in *Beynon v. St. George-Dixie Elks Lodge*, 854 P.2d 513 (Utah 1993). In *Beynon*, we held that the Utah Civil Rights Act, Utah Code Ann. §§ 13-7-1 to -4 (UCRA), proscribing discrimination based on race, color, sex, religion, ancestry, or national origin, applied to the St. George-Dixie Elks lodge notwithstanding its status as a "private" club. *Id.* at 518.

Upon receiving notice from the DABC of forthcoming hearings, two clubs summarily amended their bylaws

and signed statements that the clubs would not discriminate on the basis of race, religion, or gender in their membership policies. Formal hearings were scheduled to investigate whether the other clubs were in violation of DABC policy, specifically, whether the clubs complied with the UCRA.

A formal evidentiary hearing was held before the DABC on October 22, 1993, to determine whether the Elks clubs violated DABC directives to end the above-described discrimination. At or before this hearing, three Elks lodges voluntarily surrendered their private club liquor licenses to the DABC and began leasing a portion of their premises to newly formed clubs which do not discriminate in their membership policies, with the understanding that these clubs would apply for state liquor licenses. At the hearing, the DABC determined that the remaining nine Elks lodges were in violation of DABC directives to end discriminatory membership policies. On November 19, 1993, the DABC signed a final order suspending the liquor licenses of the nine Elks lodges. Seven of the nine Elks lodges eventually surrendered their liquor licenses, while the remaining two, the Elks petitioners in this case, lodged a petition for a writ of review with the Utah Court of Appeals.

The DABC also conducted formal hearings in January 1994 to determine whether the Moose lodges in question were in compliance with DABC directives. Following the formal hearings, the DABC entered an order suspending the liquor licenses of both Moose lodges on January 28, 1994, on the basis that the membership practices of the Moose were discriminatory. On February 25, 1994, the Moose lodges filed a review request with the Utah Court

of Appeals. These petitions have been transferred to this court pursuant to section 78-2-3(b) of the Utah Code.

Petitioners in both cases are private, nonprofit fraternal organizations. The Elks and Moose lodges involved in this proceeding are units of national orders of Elks and Moose clubs. As such, they are required by club charter to abide by the rules and bylaws of the national organizations. The Elks and Moose lodges prohibit women from membership in their organizations. However, they do allow women to become members of auxiliary units of the lodges, known respectively as Ladies of the Elks and Women of the Moose. Ladies of the Elks is an auxiliary comprised of female relatives of local Elks lodge members. Women of the Moose is broken into two separate groups: The Home Chapter of Women of the Moose, members of which are not related to Moose members, and Women of the Moose, members of which may or may not be related to Moose members. Pursuant to club charters and bylaws, women may not vote or participate in the governance of the Elks and Moose lodges or in the governance of the private liquor clubs established within these lodges.

Each of the petitioning lodges has been issued private-club liquor licenses pursuant to Utah Code Ann. §§ 32A-5-101 to -108. These licenses are held by lodge units which prohibit female members. Therefore, these lodges prohibit women from becoming members of their respective private liquor clubs; even women who are auxiliary unit members are considered guests of the liquor club. For instance, the Rules and Regulations for Private Club Operation promulgated by the general House Committee of the Loyal Order of Moose state that

a "qualified guest" of the private club is defined, inter alia, as "a member of good standing of the women of the Moose." Those rules also indicate that women who are family members of Moose members or the "ladyfriend" of a Moose member must leave the club (as must all prospective male Moose members) when the sponsoring Moose member leaves. However, at each lodge, women who are deemed "qualified guests" are allowed access to the social quarters where liquor is sold and are allowed to purchase liquor.

A. Complaints

The Elks and Moose lodges seek review on several grounds of the DABC's decision to suspend their liquor licenses. First, petitioners attack the constitutionality of both the UCRA and the various alcoholic beverage control acts on the ground that they facially violate petitioners' freedom of association by purporting to regulate private organizations. They next argue that these acts are unconstitutional as applied to petitioners because they condition the grant of a state-endowed privilege (a liquor license) upon the voluntary relinquishment of petitioners' constitutional rights (the right of free association). They also argue that the acts involved are unconstitutionally vague and overbroad. Finally, they argue that the DABC's finding that petitioners discriminated against women is clearly erroneous because no woman has either applied for or subsequently been denied membership in their specific lodges. They also argue that because women are allowed to purchase liquor at their clubs, there has been no act of discrimination to warrant the DABC's decision to suspend their licenses.

II. STANDARD OF REVIEW

Because this court is asked to review the decision of a state administrative agency, the standard by which we review the decision is governed by the Utah Administrative Procedures Act (UAPA). Utah Code Ann. §§ 63-46b-0.5 to -22. Regardless of the standard of review the court uses, UAPA requires that no decision of an administrative agency be altered by an appellate court unless the party seeking review has been "substantially prejudiced" by the agency's actions. Utah Code Ann. § 63-46b-16(4). Apprised of that threshold, we review agency decisions based on the following model:

In reviewing an agency's factual findings, we will affirm them "only if they are supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-43b-16(4)(g); *see also Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1385 (Utah 1993). Such findings "will not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible." *Hurley v. Board of Review*, 767 P.2d 524, 526-27 (Utah 1988). We have defined "substantial evidence" as the "quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990).

Challenging an agency's findings of fact, then, imposes a marshaling burden on the petitioner. A party seeking to overturn a commission's factual findings must marshal all of the evidence supporting those findings and demonstrate that despite such evidence, those factual

findings are not supported by substantial evidence from the record. *Kennecott*, 858 P.2d at 1385.

This court applies differing standards of review to an agency's legal interpretations. First, where the legislature has explicitly or implicitly delegated discretion to the agency to interpret or apply that law, an intermediate deference standard of review is applied. *See Zissi v. Tax Comm'n*, 842 P.2d 848, 852 & n.2 (Utah 1992). And second, where there is no explicit delegation of discretion and the issues are questions of constitutional law and statutory construction, we review the agency's decision for correctness. *Id.*

III. ANALYSIS

A. Freedom of Association

Petitioners argue that the DABC's decision to suspend their liquor licenses for failure to allow women full membership rights in their organizations violates their right to freedom of association under the First and Fourteenth Amendments of the United States Constitution and under article I, sections 1 and 7 of the Utah Constitution.[1] This court has already held that a private club's liquor license may be suspended for discriminating against women without encroaching upon the club members' rights of association. In *Beynon v. St. George-Dixie Lodge #1743, Benevolent & Protective Order of Elks*, 854 P.2d

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[1] Because petitioners do not brief this court on the meaning, content, or scope of the Utah Constitution provisions, as distinguished from the United States Constitution's protections, we treat only the federal constitutional issues.

513 (Utah 1993), this court held that the decision to suspend the Elks' liquor license for declining membership to Sandra Beynon solely because of her gender "does not implicate the right to free association." *Id.* at 518. As we stated in that case:

> [A]ny entity seeking a private club liquor license must submit itself to the intense regulation imposed by the state legislature . . . . The Elks *voluntarily* elected to abide by the laws of Utah, including the [UCRA], when it applied for and received the private club liquor license. . . . As long as the Elks maintains its liquor license, it may not discriminate. Our decision *does not impinge on the Elks' right to free association;* it merely precludes the Elks from using a state liquor license in a discriminating fashion.

Id. (emphasis added) (citing *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974)).

In their briefs, petitioners attempt to establish that Moose and Elks Orders are "private" organizations and hence protected from government interference regarding their associational rights. Their arguments are inapposite. It is undisputed that these organizations are to some extent "private." The Alcoholic Beverage Control Act *requires* that organizations be private to obtain a private club liquor license. Utah Code Ann. § 32A-5-101. However, status as a private club does not confer upon these clubs the right to "promote prejudice for profit" by and through a state-granted liquor license. *Cornelius*, 382 F. Supp. at 1204. In *Beynon*, we stated, "We need not determine whether Elks activities should be constitutionally protected because the Elks is free to relinquish its liquor license." 854 P.2d at 518-19. Nonetheless, examination of

the rights protected by the First Amendment demonstrates that the Elks and Moose lodges have not presented a cognizable claim under the implied right to freedom of association contained in that amendment.

We begin by noting that the right of association is not expressly guaranteed in the United States Constitution. As a right distilled from the broad terms of the First Amendment, its history is relatively brief. The constitutional right to associate with persons of one's own choosing was first, and in a very limited fashion, recognized as a guaranteed right only thirty-seven years ago in *NAACP v. Alabama*, 357 U.S. 449, 466 (1958).[2] Initially, this right was viewed as a limited extension of the right of free speech. Essentially, the Court protected those who sought to prevent the disbursement of membership lists of unpopular organizations, as such action would have had a chilling effect on those who wanted to support and endorse political speech in the context of an institution. *See, e.g., Bates v. City of Little Rock*, 361 U.S. 516, 527 (1960); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960). In both of those cases, governmental entities were prohibited from requiring individuals to disclose the organizations they patronized as members. Through this protection, persons who were unwilling to individually voice unpopular opinions could speak indirectly by supporting organizations whose tenets reflected its patrons' beliefs.[3]

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[2] The Supreme Court did occasionally refer to a right of associational freedom in other opinions before formally recognizing the right in *NAACP*. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 249 (1957); *Whitney v. California*, 274 U.S. 357, 371 (1927).

[3] This should not be construed to mean that all members of the organizations involved in early freedom of association

The first hint that the First Amendment guaranteed the right of free association outside of this narrow speech-oriented context came in *Griswold v. Connecticut*, 381 U.S. 479 (1965). There, in dicta, Justice Douglas stated that the right of association, in some form, was protected in ways "that are not political in the customary sense but pertain to the social, legal and economic benefit of the members." *Id.* at 483. It was not until the 1970s that the Supreme Court clearly recognized the rights of individuals to associate with others as a separate, independent claim. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 502-05 (1977) (protecting rights of certain immediate family members to cohabit). However, the recognition of this right does not wholly remove the right of the state to regulate certain aspects of gatherings. "The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas . . . . " *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). It is well recognized that the more public a gathering is, the more the state may impose regulatory burdens on the functions of the group. *Id.*

Therefore, the history of First Amendment jurisprudence regarding the right of free association indicates first that the right is not absolute; it is instead a right which exists on a continuum of protection. The more

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proceedings wanted their membership in the involved organizations kept secret, only that those who did wish such secrecy were entitled to it.

intimate and personal a gathering, such as a family gathering, the more limited is the state's ability to influence or regulate the associational choices made by the group. By contrast, the larger the group and the more its activity is open to a cross-section of the community, such as a business organization, the less claim that organization has to constitutional protection. Critical examination of the early association cases demonstrates also that regardless of the extent to which the right exists, it is not absolute. The less the right is protected, the lower the threshold for state regulation, while the more the right deserves protection, the more compelling the state's interest must be to merit interference. Our decision in *Beynon* has already established that the state interest in prohibiting gender-based discrimination outweighs whatever associational interest, if any, the Elks or the Moose may have in maintaining state-licensed liquor clubs. *Beynon*, 854 P.2d at 518.

Notwithstanding our decision in *Beynon*, the parties have cited numerous cases dealing with instances where a state has or has not been found authorized to impose restrictions on "private" group functions. Petitioners rely heavily on *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), and its progeny for the notion that the state cannot suspend a liquor license solely for the practice of discrimination in private settings. The DABC relies in turn upon *Roberts* and its progeny for the notion that a state's civil rights act can proscribe discrimination against women by a private organization when that organization's level of intimacy is so low as to place it within the realm of state regulation. Because our opinion in *Beynon*

did not explicitly examine these cases, we now discuss their impact on the present dispute.

Petitioners' reliance on *Irvis* in the context of the present case is misplaced. *Irvis* stands for the proposition that in constitutional analysis, the state's issuance of a liquor license to a discriminatory organization is not sufficient "state action" to create a valid claim under the Fourteenth Amendment. *Irvis*, 407 U.S. at 176-77. In making this determination, the Supreme Court pointed out that any group that meets in a building is in some way linked to the state through the state's regulation of water and sewer lines, electricity, and phone lines – all of these services are supplied to organizations which may discriminate in any number of ways. *Irvis* held that merely issuing a license to an entity that discriminates against a certain class of persons cannot be sufficient in and of itself to support a finding that the state itself is a discriminating actor. *Id.* Therefore, because *Irvis* had failed to show sufficient involvement *by the state* in the Moose's discriminatory practices, his equal protection claim was dismissed. *Id.* at 179.

Irvis and its progeny, while valid law, are inapplicable to the scenario before us. There is no claim of discriminatory *state involvement* by any party, and petitioners' liquor licenses were not suspended as a result of equal protection violations based on the Fourteenth Amendment. Instead, they were suspended for violations of the UCRA, which states that not only the state, but even individuals, while acting in public or regulated capacities, can be sanctioned for discriminating against protected classes. Therefore, the *Irvis* holding is not controlling.

The Moose petitioners also refer us to the recently issued opinion in *Hurley v. Irish-American Gay Group of Boston*, 115 S. Ct. 2338 (1995). In that case, the Supreme Court held that the Massachusetts public accommodations law could not be used to force private parade organizers to allow a group to march in their parade when that group wished to impart a message which the parade organizers did not want to convey. *Id.* at 2343. However, that opinion does not treat the issues that are before this court today. *Hurley* addressed only the right to control the content of a parade's "message" under the First Amendment's guarantee of free speech; it specifically did not address the issue of *participation* of protected groups in the parade. "[The law's] enforcement does not address any dispute about the participation of openly gay, lesbian or bisexual individuals in various units admitted to the parade. The petitioners disclaim any intent to exclude homosexuals . . . . " *Id.* at 2347. In fact, *Hurley* further distinguished the two scenarios: "[Laws prohibiting] discrimination on the basis of 'race, color, religious creed, national origin, [or] sex . . . ' in 'the admission of any person to, or treatment in any place of public accommodation . . . ' are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, *and they do not, as a general matter, violate the First or Fourteenth Amendment[ ].*" *Id.* at 2346 (emphasis added) (quoting Mass. Gen. Laws § 272:98) (citing *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11-16 (1988); *Roberts*, 468 U.S. at 624-26). Therefore, *Hurley* has no application to the issues presented by a state-licensed liquor club's decision to wholly exclude an entire class of society from participation.

We next turn to *Roberts*, where the Supreme Court held that the Minnesota Human Rights Act, which prohibits discrimination against women, applied to all places of "public accommodation" within that state, including "private clubs" such as the Jaycees, and that the enforcement of the act did not amount to a denial of the Jaycees' right to free association. The analysis contained in that opinion is very persuasive.

Many of the claims petitioners raise in the present case were addressed by the court in *Roberts*. Ironically, the Elks cited *Roberts* in the *Beynon* case, arguing that they deserved the protections denied to the Jaycees. In rejecting their argument, we stated that we did not need to decide whether the Elks' activities were protected because the Elks were free to relinquish their liquor license and continue their membership policies. *Beynon*, 854 P.2d at 518-19. Closer examination of *Roberts* demonstrates that the Elks and the Moose are similarly situated to the Jaycees, and their claims to associational protections fail for the same reasons the Supreme Court rejected the Jaycees' claims.

Roberts arose as a conflict between the Jaycees, a nonprofit, fraternal private club, and the commissioner of the Minnesota Department of Human Rights. After an investigation of the Jaycees' membership policies, the commissioner found "probable cause to believe" that those policies violated the state's human rights act. 468 U.S. at 615. Initially, the local chapters of the Jaycees began accepting women members, and they even allowed women on the clubs' governing bodies. However, the national Jaycees organization threatened sanctions against the local units unless they complied with national

policy prohibiting women membership. *Id.* Like the instant case, no woman had been actually denied membership by the Jaycees when the dispute arose. *Id.* at 614-16. In fact, the complaint of discrimination was actually filed by current members of the Minnesota Jaycees who did not want to be forced to conform with national Jaycees requirements. *Id.* at 614. The commissioner found that the standing policy against women members violated the state's human rights act. *Id.* at 615-16. The Jaycees appealed this decision, arguing that it violated their right to freedom of association.

The Supreme Court began its analysis in *Roberts* with a history of the right to freedom of association, noting that the more intimate the setting, the more important the need to protect the right, and conversely, the more public the setting, the less protection the right receives. *Id.* at 620-22. Observing that membership in the Jaycees was open to virtually any male within the allotted age category, *id.* at 613, 621, and that the club had national membership figures in the thousands, the Court concluded that the group could not be considered an extremely "intimate" organization needing heightened protection under the First Amendment. *Id.* at 621, 623; *see also id.* at 631 (O'Connor, J., concurring). We find the membership policies of the petitioners in this case to be substantially similar to those of the Jaycees. All require their members to be of "good moral character" but, to a large degree, accept most male applicants into the club.[4] We note that

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[4] Some of the lodges have more restrictive membership policies than those established in the lodges' national bylaws. For example, we note that the Tooele Moose Lodge prohibits all nonwhites as well as all women.

the Moose organization purports to be "the largest fraternal organization . . . in the world," claiming approximately 1,000,225 members.[5] The large size of the national Jaycees organization was one of the controlling factors that the Supreme Court found to prevent the Jaycees from deserving constitutional protection of their associational rights. *See Roberts*, 468 U.S. at 631 (O'Connor, J., concurring) ("Whatever the precise scope of the rights recognized in such cases, they do not encompass associational rights of a 295,000-member organization whose activities are not 'private' in any meaningful sense of that term."). The Elks and the Moose are both undisputedly larger organizations than the Jaycees.

We also note that while the Jaycees, the Elks, and the Moose all have some "private" aspects of their membership, all of these clubs function in a highly social, public way. For instance, many Elks clubs also function as public restaurants, and the various lodges are often offered to the public for use as gathering places for weddings or other social functions.[6] We also note that like the Elks and Moose lodges, the Jaycees did allow women to become

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[5] 12 Utah Alcoholic Beverage Control Commission Proceedings, *DABC v. MOOSE #'s 2013, 259*, at 14, 17 (Nov. 19, 1993).

[6] The Moose petitioners argue that because they do not hold themselves out to the public as frequently as the Elks, they are a more private group and therefore escape the application of the URCA. This argument is without merit. In *Beynon*, we held that the UCRA applies to all groups issued a state liquor license. 854 P.2d at 518. Therefore, once a group has accepted a state liquor license, it has accepted concurrently the burden of comporting with license regulations, which preclude, inter alia, violations of the UCRA. *See id.*

members of auxiliary units of the club. *Id.* at 613. The only difference between men and women members in the Jaycees was that as "associate members," women were not allowed to vote or hold office in the club. *Id.* We note that because of their status as guests of the private liquor club, Ladies of the Elks and Women of the Moose are likewise prohibited by state law from such participation. *See* Utah Code Ann. § 32A-5-103(1)(a) ("Each member shall own one share of stock and no member or other person shall own or control, directly or indirectly, more than one share."); *id.* § -103(1)(e) ("The club shall be managed and operated by a governing board, . . . each of whom is a shareholder or voting member of the club and is elected by the holders of shares or members entitled to vote.").[7] Therefore, as the Supreme Court concluded in *Roberts*, we conclude that the state's interest in ending gender-based discrimination outweighs the protection the state needs to offer petitioners regarding their right of association. *Id.* at 623.

In his concurring and dissenting opinion, Justice Stewart draws a distinction between the Elks and the

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[7] Another similarity between the Jaycees, the Elks, and the Moose is the participation of women through auxiliary units. In *Roberts*, the Court noted that this participation preempted the clubs' right to argue that their right to political speech will be burdened by forcing them to accept women members. That is, by arguing that women are already allowed access to the clubs' activities and therefore not discriminated against, the clubs cannot also maintain that they desire to exclude women for intimate or political purposes. *Id.* at 627. *Roberts* also indicated that the argument that allowing women access to club activities but preventing them from voting is an important symbolic message "is attenuated at best." *Id.*

Moose for purpose of application of the UCRA. He agrees, in essence, that the Elks are bound by the UCRA but would hold that the Moose are not. However, this distinction is based solely upon interpretation of certain facts which Justice Stewart believes render the two organizations different for First Amendment purposes. This distinction lacks legal support and contradicts binding precedent from both this court and the Supreme Court.

In *Beynon*, we held that *all* licensees of the DABC were required to comply with the UCRA, not only those licensees deemed "most" public in nature. "Under the [Alcoholic Beverage Control Act], *any entity* seeking a private club liquor license must submit itself to the intense regulation imposed by the state legislature." *Beynon*, 854 P.2d at 518 (emphasis added). Justice Stewart's opinion directly contradicts this holding by suggesting that only those clubs which are deemed sufficiently "public" are required to obey the UCRA, while other licensees are not.[8] In fact, legal standards do exist by which public laws may be applied to private organizations.

In *Roberts*, the Supreme Court undertook a lengthy discussion of the distinction between public and private

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[8] The main difference between the organizations, as cited by Justice Stewart, is that the Elks "offer their facilities to the public" by operating restaurants and catering to social activities; by actively recruiting new members; and by conducting activities in which non-Elks participate. By contrast, he states that the Moose "do not operate public restaurants . . . , do not open their facilities to the public . . . , do not encourage nonmembers to participate," and have more stringent guidelines that apply to nonmember guests.

organizations in relation to the application of state civil rights laws. 468 U.S at 619-22. *Roberts* noted initially that there is a spectrum of private groups, characterized by many nuances. At one end, groups characterized as small, intimate, and highly selective in affiliation are generally afforded broad constitutional protections. At the other extreme are large, complex businesses and organizations that lack the intimacies of small groups. These may well be privately owned or organized groups, but they are much less in need of strict constitutional protection of associational rights because of their size and relatively impersonal nature. *See id.* In deciding which end of the spectrum most closely described the Jaycees, the Court focused on the size of the national Jaycees organization, the less-than-strict observance of club rules and bylaws, and the lack of meaningful discriminatory requirements for membership. *Id.* at 620-22, 639. Having concluded that the Jaycees were more like the impersonal business organization than the small, intimate organization, the Court held that the Jaycees were subject to the Minnesota human rights laws. *Id.* at 628-29, 631. An examination of these factors in relation to the Moose yields the same result. Like the Jaycees, the Moose is a large national organization. In fact, the organization itself purports to be the world's largest fraternal organization, with over one million members. As Justice O'Connor observed, whatever associational protections have been recognized for groups in previous First Amendment jurisprudence, those cases "do not encompass associational rights of a 295,000 member organization whose activities are not 'private' in any meaningful sense of that term." *Id.* at 631 (O'Connor, J., concurring). Justice Stewart's decision to

include a group with over one million members in a category that does not include a group of 295,000 is perplexing.

Another element that exposed the Jaycees to state regulation in *Roberts* was the informal application of their own bylaws prohibiting women members. *Id.* at 621.[9] The

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[9] The dissent suggests that we misconstrue *Roberts* because we claim that *Roberts* considered the size of the national organization of Jaycees, not merely the size of local chapters, and that our opinion states that the Supreme Court considered the Jaycees' casual attitude about their own bylaws in conjunction with its decision that the Jaycees were not entitled to the heightened protection of a highly intimate group. However, we note that while the dissent is correct that the *Roberts* majority mentions only the size of local chapters in its conclusion, 468 U.S. at 621, the majority specifically mentions the size of the national organization in its description of the Jaycees' characteristics elsewhere in the opinion. *E.g.*, *id.* at 613.

Moreover, in numerous places the *Roberts* majority analyzes instances where the Jaycees have violated their own bylaws by allowing women to participate. *E.g.*, *id.* at 614 ("Currently, the memberships and boards of directors of both chapters include a substantial proportion of women. As a result, the two chapters have been in violation of the national organization's bylaws for about 10 years."); *id.* at 621 ("Indeed, numerous nonmembers of both genders regularly participate in a substantial portion of activities . . . . "); *id.* at 627 ("[T]he Jaycees already invites women to share the group's views and philosophy and to participate . . . . Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best."). While not all of these instances highlight the fact that the Jaycees are violating their own bylaws, the opinion's discussion of these regulations clearly informs the reader that each of these activities is indeed a violation of the

Moose petitioners have likewise admitted that the bylaws prohibiting women from bringing guests to the social quarters are "never enforced."[10] Finally, as the Supreme Court noted of the Jaycees, the Moose organization has no meaningful criteria to discern which applicants will be selected for membership. Both national and local Moose clubs offer membership to any males above the age of twenty-one years who are of good character, believe in God, are not members of the Communist party, and have not been convicted of a felony. These are not "highly selective" criteria, as outlined in *Roberts*. 468 U.S. at 620. Indeed, there is no evidence in the record of any male applicant being denied Moose membership. Nor can the Moose truly be said to prohibit nonmembers from participating in their activities, as asserted by Justice Stewart, when the Moose clubs themselves admit that they routinely allow women (who are not members) to participate in liquor club use *and* to vote on certain matters despite their own bylaws' forbiddance of the practice.

Therefore, the distinction drawn by Justice Stewart between the Elks and the Moose for purposes of the UCRA is contrary to the precedent of this court in *Beynon* and to Supreme Court precedent in *Roberts*. Moreover, the factual discrepancies which Justice Stewart finds determinative, such as selectivity and nonmember segregation, are not supported by the record. *See Warfield v. Peninsula*

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organization's bylaws. *Id.* at 613-14 (setting out the bylaws which these activities violate).

[10] The Tooele Moose lodge has also adopted a bylaw stating that only "white males" will be allowed to join. This bylaw, according to the Moose's oral argument, is never enforced.

Golf & Country Club, 896 P.2d 776, 777-78 (Cal. 1995) (holding that a private club must comply with the California civil rights act). "[A]n entity is not automatically exempt from the strictures of [the civil rights act] simply because it characterizes itself as a 'private social club' . . . . [A]n entity is not invariably immune from the nondiscrimination mandate of [the act] simply because it exhibits some of the attributes of a private club." *Id.* at 791.

At this point, it should also be noted that the sale and consumption of liquor is highly regulated in the state of Utah. Whereas the *Roberts* opinion dealt only with the principle of discrimination in a large social organization, the Moose and Elks lodges in question are some of the relatively few establishments in this state that are allowed to sell liquor. Citizens in Utah may purchase liquor only through state liquor stores (where no consumption is allowed), at licensed private clubs, or at licensed restaurants. That makes discrimination by these clubs more egregious because it lessens the availability of certain classes of persons to purchase liquor for consumption for themselves or guests. In other words, if we were to hold that all private clubs were allowed to discriminate against groups protected by the UCRA, it could theoretically result in the total exclusion of these groups from important social opportunities. It goes without saying that social clubs are often used for entertaining business clients as well as personal friends; the result sought by petitioners would thus permit exclusion of a significant portion of the community from important social activities that accompany the regulated sale and consumption of liquor. Any unpopular class or group of

persons could be excluded because discriminatory practices would be cloaked by a veil of privacy available to every club where liquor is bought and sold. This case deals with gender discrimination, but it should be emphasized that petitioners' position (and the conclusion of the dissenting opinion) would permit some clubs holding state liquor licenses to discriminate in membership on the basis of race as well. Membership discrimination, in turn, creates the real possibility of service discrimination; if only men or whites can be members of an organization that dispenses liquor and only members are allowed to buy, the liquor license could be used for invidious discrimination.

Utah's regulatory scheme imposes an affirmative burden to abide by certain standards upon all who dispense liquor. Utah Code Ann. §§ 32A-5-101 to -108. Petitioners, by voluntarily applying for a liquor license, have agreed to become one of the relatively few organizations in this state allowed to dispense liquor.[11] To possess such a license is to perform a quasi-public service to the extent that members of the public in this state can purchase liquor only through regulated licensees. To that end, although petitioners are private organizations apart from the liquor club within each lodge and are entitled to the constitutional protection afforded all private entities, by voluntarily accepting the role of DABC licensee, they acquire a quasi-public status whenever engaged in the buying or selling of alcohol. A private individual may have private rights of speech and association at home,

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[11] The number of liquor licenses available at any given time is limited by statute. Utah Code Ann. § 32A-5-101(4).

but when that individual enters the public marketplace or even the public work place, her status is transformed, she functions in part as a publicly regulated entity in society. *See Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964) (privately owned restaurant cannot exclude black patrons). *See generally Jones v. Mayer*, 392 U.S. 409 (1968); *United States v. Guest*, 383 U.S. 745 (1966); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). In all of these cases, privately owned entities were prohibited from discriminating against protected classes of society. These holdings were made despite the fact that the owners of these establishments had rights to associate with whomever they chose and, by implication, to choose not to associate with other persons. By being in the public sphere and in the stream of commerce, they voluntarily surrendered the rights they had in their private lives to discriminate. Likewise, the Elks and the Moose have become subject to the UCRA by agreeing to become licensees of the DABC. It is this legal principal that allows the state to prevent privately owned businesses, such as restaurants, from excluding minorities or members of unpopular ethnic or religious groups. Hence, petitioners' rights of association, which may well be protected in some areas, do not exist in the sphere wherein they make use of a liquor license. "[I]t is important to note that the associational activities of the Elks and Moose are purely social and not political and therefore do not come within the core protection of the right to associate." *Cornelius*, 382 F. Supp. at 1195 (citing *Sigma Chi Fraternity v. University of Colorado*, 258 F. Supp. 515, 523-26 (D. Colo. 1966)).

On the basis of the foregoing, we hold that the DABC's decision to apply the UCRA to petitioners does

not violate those groups' rights to freedom of association. *Beynon*, 854 P.2d at 518.

B. Unconstitutional Conditions

Petitioners next argue that by conditioning the state's largess (liquor licenses) upon the relinquishment of a constitutional right (freedom of association), the state is unconstitutionally conditions the bestowal of a privilege. However, as explained above, this argument is inapplicable to the suspension of the Elks' and the Moose's liquor licenses because the Elks and the Moose are not entitled to the degree of constitutional protection they claim. *Roberts*, 468 U.S. at 623; *Beynon*, 854 P.2d at 518. By accepting liquor licenses, these clubs become enterprises "regulated by the state." To the extent their activities are subject to the state regulation, those activities cannot be said to be " 'private' in any meaningful sense of the term." *Roberts*, 468 U.S. at 631 (O'Connor, J., concurring); *see also Beynon*, 854 P.2d at 515; *Coalition For Open Doors v. Annapolis Lodge No. 622, Benevolent & Protective Order of Elks*, 635 A.2d 412, 413 (Md. 1994). Having made the decision to accept a liquor license, the Elks and the Moose have voluntarily surrendered a portion of their private status. By entering the public sphere, albeit in a limited fashion, they have *voluntarily* surrendered the right of private discrimination on prohibited grounds. *See Cornelius*, 382 F. Supp. at 1195. Because our decision affects only that portion of petitioners' activities that are in the public sphere, it does not impinge upon the right to free association, a private right. *See Roberts*, 468 U.S. at 620. Therefore, the "condition" that the state imposes upon all liquor licensees – compliance with all state laws – does not, either directly or indirectly, remove any constitutional

rights of the Elks or the Moose. There is no constitutional right to discriminate in the public, as opposed to the private, sphere.

In support of their position, petitioners urge us to adhere to a treatise on unconstitutional conditions by Professor Van Alstyne, where he instructs that what the government cannot do directly, it ought not be able to do indirectly by "coercing" parties to forfeit constitutional rights the government could not itself suspend. *See* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitution Law*, 81 Harv. L. Rev. 1439 (1968). However, Professor Van Alstyne also acknowledges:

> The doctrine of unconstitutional conditions has usually been applied only to regulations which directly forbid the enjoyment of an explicit constitutional right. The doctrine has been of little assistance in those situations, however, where the regulation of status *in the public sector* has had only an indirect effect on such a right, without directly and wholly forbidding its exercise. . . . [O]ne has no constitutional right per se to status *in the public sector*.

Id. at 1449 (emphasis added).

Justice Stewart's opinion also argues that requiring the state liquor licensees to comply with the UCRA would place an unconstitutional condition upon those clubs. He states, "Whether the Moose lodges 'voluntarily' seek the privilege of a liquor license or whether they are compelled through operation of the state's police power to do so, the regulatory scheme imposes the condition of giving up constitutional rights of freedom of association for the receipt of a benefit from the state." However,

Justice Stewart's opinion ignores the operative premise that a state *can* place conditions on the bestowal of benefits; it simply cannot place an unconstitutional condition on that bestowal. Justice Stewart's point would be equally applicable to the Supreme Court in *Katzenbach*. There, the state forced a privately owned restaurant to give up an associational choice of excluding black patrons before it would grant state licensing. *Katzenbach*, 379 U.S. at 299-300. This is precisely the police power that Justice Stewart now attacks. This condition was nevertheless constitutional because the restaurant owner had no right to discriminate publicly. Likewise, the Moose and the Elks may very well be allowed to discriminate in their private meetings. However, where they seek to operate a state-licensed liquor club, the state is permitted to enforce its civil rights act. *Beynon*, 854 P.2d at 518. Hence, the condition placed on liquor club licensing is not unconstitutional.

In sum, our decision does not impose an unconstitutional condition upon the Elks or the Moose because our ruling affects an area of those organizations' activities that does not encompass the right of free association. *Roberts*, 468 U.S. at 623; *Cornelius*, 382 F. Supp. at 1195; *Beynon*, 854 P.2d at 518. Again, the condition of nondiscrimination does not require petitioners to sacrifice any constitutional right that they now possess.

C. Constitutionality of Utah's Liquor Laws

Petitioners next argue that Utah's liquor laws are unconstitutionally vague and broad. Specifically, they contend that the statutory language relied upon by the

Commission to suspend their licenses – "the private club will not be used for permitting gambling or *any other violation of law or ordinance,*" Utah Code Ann § 32A-5-105(2)(c) (emphasis added) – violates their rights to due process of law because the language is overly broad and/or vague.

This court will construe a challenged statute to avoid constitutional infirmities wherever possible. *Society of Separationists, Inc. v. Whitehead,* 870 P.2d 916, 920 (Utah 1993). The commission must similarly prefer a constitutional reading of a statute over an unconstitutional interpretation thereof. *Chris & Dick's Lumber & Hardware v. Tax Comm'n,* 791 P.2d 511, 516 (Utah 1990). Therefore, we will find the statute unconstitutional only if petitioners can demonstrate that the statute is either facially unconstitutional or unconstitutional as applied. In making this determination, we will resolve any reasonable doubt in favor of constitutionality. *Society of Separationists,* 870 P.2d at 920.

An enactment will be held unconstitutionally vague only if the terms of the law are so ambiguous that persons of ordinary intelligence are unable to determine whether their acts conform to the law. *Kolender v. Lawson,* 461 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972). The only language that petitioners argue is impermissibly vague is the phrase which indicates that club licensees may not allow their premises to be used to violate "any . . . law or ordinance." Utah Code Ann. § 32A-5-105(2)(c). Petitioners do not argue that this phrase is subject to differing interpretations, nor do they attempt to show that as licensees they are unable

to determine whether their conduct conforms to the statute. The only support petitioners offer for their position is *Atlanta Attractions, Inc. v. Massell*, 330 F. Supp. 865 (N.D. Ga. 1971), *aff'd*, 463 F.2d 449 (5th Cir. 1972). In that case, the plaintiff's liquor license had been suspended for allegedly violating several state ordinances. The Georgia scheme allowed for the revocation of a liquor license by the state alcoholic beverage control commission whenever that commission found "due cause." Based on the breadth of this phrase, the court found this ordinance unconstitutional. 330 F. Supp. at 866. *Massell* offers no support for petitioners in this instance, however. First, a showing of overbreadth is not a showing of vagueness. *State v. Hoffman*, 733 P.2d 502, 505 (Utah 1987). Second, we find the language "for due cause" to be distinguishable from language which requires a club to certify that it will not use its premises for gambling or violation of any other laws. While the Utah law may be strict, it is not so vaguely drafted as to make persons of ordinary intelligence guess at whether they are comporting with its requirements. *See, e.g., Papachristou*, 405 U.S. at 162. We also note that the language of the Georgia statute allows for arbitrary enforcement through the broadly framed term "due cause." There is no such phrase in the Utah statute. In fact, Utah's statute requires the action to be taken by club incorporators, who are required to include a statement of compliance in the club's bylaws. Utah Code Ann. § 32A-5-105(2)(c). The Georgia statute required Alcoholic Beverage Control officials to make the determination of whether the clubs were complying with all state and local ordinances or whether there was "due cause" to revoke the license. The statute was problematic

because the operative phrase "due cause" was so broad as to open the door to abuse, as no restrictions or guidelines were imposed on the commission in making this determination. *Massell*, 330 F. Supp. at 866. The facts in the Georgia case are so different from those in our case as to make it entirely inapposite.

Because petitioners have made no showing, either legally or factually, to support their contention that the language of the challenged Utah statute is subject to arbitrary enforcement or to differing but reasonable interpretations, we hold that the language is not unconstitutionally vague.

We also hold that the language is not overly broad. Statutory language is overbroad if its language proscribes both harmful and innocuous behavior. Stated another way, a statute is overbroad if it attempts to sanction constitutionally protected activities. *State v. Frampton*, 737 P.2d 183, 192 (Utah 1987). Because the statute in question proscribes club licensees only from allowing activities that are already illegal from taking place on their premises, it does not sanction *any* protected behavior. Also, unlike the Georgia statute, which as noted above places broad discretion in the hands of enforcement officials, the language in Utah's statute is not so broad as to either risk arbitrary enforcement or sanction protected behavior. Therefore, we affirm the Commission's ruling that the challenged language is not unconstitutionally broad. *See also Roberts*, 468 U.S. at 630-31 (holding that Minnesota Human Rights Act, which prohibits discrimination against women by large social organizations, is neither unconstitutionally vague nor overbroad).

D. The Scope of the Commission's Authority

Petitioners next argue that the Commission lacks the authority or jurisdiction to enforce the UCRA. To make this point, they rely on our decision in *Williams v. Public Service Commission*, 754 P.2d 41 (Utah 1988), wherein we stated that a commission "can only assert those [powers] which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it." *Id.* at 50. Moreover, we stated, "To insure that the administrative powers of the [commission] are not over extended, 'any reasonable doubt of the existence of any power must be resolved against the exercise thereof.' " *Id.* (quoting *Public Serv. Comm'n v. Formal Complaint of WWZ Co.*, 641 P.2d 183, 186 (Wyo. 1982)).

Again, because this issue was recently decided by this court in *Beynon*, we can quickly dispose of petitioners' claims. In making its determination that it could suspend petitioners' liquor licenses for failing to comply with the UCRA, the Commission relied on Utah Code Ann. §§ 32A-5-103(7), 32A-5-102(3)(a) and (b), and 32A-5-105(2)(c). Those statutes give the Commission the power to suspend the license of any club that does not comport with all of the prerequisites set forth in the statutes for obtaining a license.[12] This power is not disputed by petitioners. However, they deny that the UCRA applies to private clubs and, hence, argue that even if petitioners were not comporting with the UCRA, the UCRA does not provide the Commission with a basis for

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[12] The statutes further authorize the Commission to make these decisions on the basis of the contents of a club's articles, bylaws, or house rules. Utah Code Ann. § 32A-5-102(3)(a).

suspending their licenses because that Act is inapplicable to them.

In *Beynon*, however, we specifically held that "the Elks is an enterprise regulated by the State under the [UCRA]." *Id.* at 515. This would likewise apply to the Moose. Therefore, on the basis of *Beynon* and the authorities cited therein, if the Commission finds that any of the Elks or Moose clubs are violating the UCRA, it has the authority to suspend the liquor licenses issued to those organizations. *Id.*; *see also Annapolis Lodge*, 635 A.2d at 423-24 (holding that City of Annapolis has authority to enact ordinance conditioning grant or renewal of liquor license upon proof that club does not discriminate by gender in its membership policies).

E. Discrimination

Finally, petitioners contend that even if the UCRA applies to them, the Commission's determination that petitioners have violated the Act is erroneous and must be reversed by this court. As indicated above, when the Commission is interpreting a general state law such as the UCRA, we will review its decision for correctness. *Zissi v. Tax Comm'n*, 842 P.2d 848, 852 & n.2 (Utah 1992); Utah Code Ann. § 63-46b-16(4)(d).

The Commission held that because the bylaws of each organization state that only males (and only white males in the case of the Tooele Elks Lodge) may be members in the private liquor club, petitioners' actions do not conform to this court's decision in *Beynon* and constitute acts of discrimination in violation of the

UCRA. We hold that the Commission correctly applied the UCRA in making this determination.

In *Beynon*, this Court held that the Elks were in violation of the UCRA for denying membership to Sandra Beynon because of her gender. 854 P.2d at 518. However, petitioners now attempt to circumvent the effects of that decision by allowing women in auxiliary units of the clubs to purchase liquor. Therefore, petitioners argue, because women have access to the clubs' liquor facilities, they are not discriminated against in any way.

We are unpersuaded. It is undisputed that petitioners do not allow women to become members of the private club holding the liquor license. While allowed to purchase liquor, women are considered "guests" of the men who sponsor their participation in the social club. As guests, these women are not allowed to vote or otherwise participate in the management of the liquor-selling entity. This is precisely the type of prohibited discrimination found by the Supreme Court in *Roberts*, 468 U.S. at 615-16. We find it significant that while women are allowed to purchase liquor as guests, they are not allowed to bring guests of their own into the facilities to purchase liquor. In a day and age when many business, political, and other social transactions are conducted in this type of social milieu, it is troubling that either women or members of racial or religious minorities could be excluded from participation. This observation is brought into sharp focus in this state where there are no alternatives to social consumption of liquor other than in private clubs. The social and business disadvantages that would result from allowing this type of discrimination

represent precisely the type of unequal treatment the legislature sought to remedy in enacting the UCRA.

As our explanation of the UCRA in *Beynon* demonstrated, the 1973 amendments to the Act were added for the specific purpose of ending gender-based discrimination. 854 P.2d at 517. In *Beynon*, we stated that it is clear from the legislative history of the UCRA "that the legislature intended that the new language be construed broadly." *Id.* In fact, the plain language of the Act states that it "shall be liberally construed with a view to promot[ing] justice." Utah Code Ann. § 13-7-1. Therefore, inasmuch as we are asked today to interpret the meaning of the word "discrimination" as used in that Act, we are bound to "liberally construe[ ] [the act] with a view . . . to promot[ing] justice." *Id.* If reasonable minds may differ about the meaning or interpretation of a particular phrase, section 13-7-1 compels us to err toward over-protection of the enlisted classes rather than toward under-protection. As shown above, the legislative intent behind the Act compels our decision that all types of discrimination, active or passive, should be proscribed.

Petitioners specifically ask us to hold today that no act of discrimination has been shown regarding their organizations for two reasons: first, because no woman has applied for, hence, no woman has been denied, membership in the lodges listed in this action, and second, because women, through the above-referenced auxiliaries, have access to the liquor dispensed by each organization and therefore have not, in petitioners' view, been denied anything.

Petitioners' first claim can be summarily dismissed. No women had yet been denied membership in the Jaycees when the petitions in *Roberts* were filed. In fact, current members of the Jaycees were the complainants. 468 U.S. at 614. However, petitioners freely admit that the only reason no woman has ever been denied membership is that none have applied for membership. They also freely admit that both their local and national bylaws and national charters would prohibit any woman from becoming a member of their organizations. Accepting petitioners' argument would have the costly and useless effect of causing this case to be remanded until a woman applied for and was denied membership, at which point the entire process of this case would have to be repeated. It is hornbook law that where it is clearly evident that an injury is about to take place, a party is *not* required to sit idly by and wait for the injury to occur before seeking to remedy the situation. *Id.* Such a holding would be costly to both the citizens of this state and the parties involved in the litigation.

The notion of "passive discrimination" has been used in various situations, like the present scenario, where the discrimination is better described as a policy or goal rather than as a specific act. For instance, in interpreting the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1988), the United States Court of Appeals for the Fourth Circuit found that a party involved in sex discrimination against company retirees was properly joined in the suit even though that party's discrimination was wholly policy based, or in other words, "passive." *Chastang v. Flynn & Emerich Co.*, 541 F.2d 1040, 1044 (4th Cir. 1976). The district court had dismissed the trustees of a retirement plan

which favored female retirees over male retirees, because the discrimination by the trustees, if any, was merely passive – on paper but not in deed. In reversing the trial court's conclusion, the Court of Appeals noted that "the Act makes no distinction between 'active' and 'passive' participants in acts discrimination." *Id.* Like the trustees in *Chastang*, the local Elks and Moose lodges may have little or no control over the national organizations' positions. Like the trustees in *Chastang*, the local lodges may well be only carrying out the directives of their home orders. However, like the federal act, the UCRA sanctions both "passive" and "active" discrimination. Therefore, the passive act of having a standing policy that prohibits the membership of women is as prohibited as the act of denying someone's membership purely on the basis of gender. That is because the UCRA is concerned with the practice of discrimination as a principle, not just with the mechanics of a specific tangible or physical act. This holding mirrors the Supreme Court's interpretation of Minnesota's Human Rights Act and the interpretation of discrimination implicit in that state's reading of its act.

Our position is also supported by Utah statutory law. The enacting statute of the UCRA states that its purpose is to abolish the "*practice* of discrimination" in its entirety. Utah Code Ann. § 13-7-1 (emphasis added). And as evidenced above, the legislative history of this Act clearly establishes that the Act was amended specifically to prohibit discrimination against women.

We also note that other jurisdictions considering discriminatory membership policies of private clubs have held that with "a showing that attempting to obtain sponsors and file an application would be futile," a party

would *not* be required to undergo the expense and humiliation of first applying for and being rejected membership status to have standing to prove discrimination. *Citizens Council on Human Relations v. Buffalo Yacht Club*, 438 F. Supp. 316, 321 (W.D.N.Y. 1977) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)); *see also Franklin County Sheriff's Office v. Sellers*, 646 P.2d 113, 121-22 (Wash. 1982). " '[W]here an employer's acts *deter* [the plaintiff] from applying, strict adherence to the "application" requirement is not mandated.' " *Sellers*, 646 P.2d at 122 (emphasis added) (quoting *Iowa Civil Rights Comm'n v. Woodbury County Community Action Agency*, 304 N.W.2d 443, 451 (Iowa Ct. App. 1981)). "*Technical* compliance with [the requirement that an 'act' of application be made] would defeat the purpose of [the Act], which is to be liberally construed to effectuate its purpose to prohibit unlawful discrimination." *Id.* (emphasis added).

We also note that recent cases have rejected the rigid view that specified, catalogued acts must be shown and have adopted the stance that whether discrimination exists should be judged by the totality of circumstances. *See, e.g., Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1502 n.18 (10th Cir. 1995) (federal definition of discrimination in fair-housing context "does not require proof of differential treatment"); *Doukas v. Metropolitan Life Ins. Co.*, 1995 WL 73345 (D.N.H. 1995) (in context of Americans with Disabilities Act, "discrimination" should be broadly defined so as not to preclude instances of discrimination even though "difficult to identify and evaluate prior to the filing of a civil action"). Therefore, we are unpersuaded by petitioners' contention that discrimination

cannot be shown unless and until a particular woman comes forward to apply for membership and is rejected.

We next examine petitioners' contention that no discrimination can be shown where women are allowed to be served liquor by and through the auxiliary chapters of the Elks and the Moose. This issue does not directly address the reasons behind the Commission's decision to suspend petitioners' liquor licenses. It is undisputed that women have been and continue to be *served* liquor as guests of the Elks and the Moose. However, this does not address the issue of discrimination in membership practices and management opportunities. Moreover, by analogy, if a club were to have a policy of allowing racial minorities to be served alcohol only if they were accompanied by or related to white club members, that club could not defend its actions on the fact that *some* minorities had in fact been served liquor in the club. The fact that *some* members of the discriminated class have been served does not eliminate the discriminatory *policy* of the club. On the contrary, it illustrates one of the fundamental characteristics of invidious discrimination, namely, the singling out on the basis of prohibited categories of certain persons for different treatment. In some circumstances, treating classes of persons differently from the rest of the community is desirable. For instance, reserving special parking stalls for handicapped individuals does segregate those individuals for purposes of different treatment. However, this segregation is done to protect and encourage that class of persons and to some extent to equalize their access to public spaces. When the segregation is done out of spite, bias, prejudice, or stereotype, that class is not only not protected, it is disadvantaged.

See Brown v. Board of Educ., 347 U.S. 483, 493-95 (1954); *United States v. Yonkers Bd. of Educ.*, 611 F. Supp. 730, 735 (S.D.N.Y. 1985); *see also* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. Pa. L. Rev. 149 (1992) (theorizing that discrimination which hampers one class with no legitimate purpose is both morally and legally wrong).

In fact, petitioners' point that some women are routinely served alcohol at the lodges only serves to highlight the futility of petitioners' claim that their associational and political rights would be violated if forced to associate with women. Petitioners argue on the one hand that barring women is protected, political speech that cannot be removed and that this is an inherent and intimate part of their organization. They argue on the other hand that there is no discrimination because some women are allowed to drink with the men and there is no rule infringing women's access to the "social" facilities.

Aside from the inconsistency presented by petitioners' arguments, there is legal precedent to dismiss this argument as well. For example, California, under its civil rights act, has held that " 'business establishments [may not] withhold[ ] their goods or services from a broad class of individuals in order to "cleanse" their operations from the alleged characteristics of the members of an excluded class.' " *Martin v. International Olympic Comm.*, 740 F.2d 670, 676-77 (9th Cir. 1984) (quoting *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 117 (Cal. 1982)). The court in *Marina* made this pronouncement in a case involving an apartment complex that enacted a rule

prohibiting families with children from leasing apartments. The complex in question allowed children to visit the complex but would not allow families with children of their own to sign a lease. The complex allowed the children already living there to remain. *Id.* at 117-18. Thus, *Marina* held that this practice was discriminatory notwithstanding the fact that "some" children were allowed in the complex.

Here, as with *Marina*, the fact that some women are allowed to participate with the Moose and the Elks in some fashion does not remedy the discrimination. *Accord Annapolis Lodge*, 635 A.2d 412. In *Annapolis Lodge*, the Maryland Court of Appeals held that the city of Annapolis had the authority to issue an ordinance which would revoke the liquor licenses of all private clubs that discriminated against women in membership policies. *Id.* at 423-24. In making its decision, the court noted, but was unaffected by, the existence of the Elks Lodge's Women's Auxiliary which permitted women to be served alcohol, as well as the fact that female guests and dependents of member Elks were also served. *Id.* at 421. Finally, as indicated above, the Supreme Court in *Roberts* was unpersuaded by the Jaycees' claim that no discrimination existed in a club wherein women were allowed to participate in all activities of the club except voting and management. 468 U.S. at 621, 623.

Therefore, we reject petitioners' claims that discrimination cannot be found when women are being served liquor on their premises. Moreover, we find that the Commission correctly applied the UCRA to the lodges through the Alcoholic Beverage Control Act, and we

affirm its findings that petitioners practice discrimination in their policies.

IV. CONCLUSION

Having rejected all of petitioners' arguments and having determined that the Commission properly applied the Utah Civil Rights Act and the Private Club Liquor License provision of the Alcoholic Beverage Control Act, we affirm the DABC's decision to suspend petitioners' private club liquor licenses. In doing so, we note that this problem can be readily addressed by the formation of a separate corporation which would hold the liquor license and to which women would belong. In doing so, the Elks and the Moose would remain separate entities, without necessarily incorporating women into the actual Orders of the Moose or the Elks if such a result is desired, and would use the separate corporation for its liquor-related activities. As highlighted in the facts section of this opinion, various fraternal orders have already done so, and the option is available, as it always has been to these petitioners.

Justice Howe concurs in this opinion.

ZIMMERMAN, Chief Justice, concurring:

I concur in the opinion of Justice Durham. I write only to respond to Justice Stewart's opinion.

In my view, there is no threat to the freedom of association posed by the requirement that those who

choose to seek to operate a "private club," as that term is used in the liquor laws of this state, not discriminate in whom they permit to "join" the "club." The Elks who were the subject of the *Beynon* opinion have already found a way to comply with the public accommodation law while continuing to discriminate against those whom they do not wish to admit to membership in their fraternal organization. the Elks have simply followed the pattern of all the theoretically "not-for-profit" organizations that by Utah law are exclusively entitled to hold liquor licenses from the state and that operate the many truly for-profit "private clubs" that dispense liquor.[1] They have organized a separate but entirely captive corporation to hold the liquor license and run the liquor dispensing operation. This corporation and its operation comply with the state antidiscrimination law. This permits the Elks' fraternal organization, which is decidedly private, to separate itself from the public liquor dispensing business and to continue to discriminate against anyone it chooses. A similar path is available to the Moose.

To require such a slight artifice of a truly private organization that desires to serve liquor under state license hardly rises to the level of a serious constitutional threat. When such a threat comes along dressed in the guise of a mere regulation, I do not doubt the ability of this court to distinguish it from the present situation.

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[1] 1 Utah Code Ann. § 32A-5-102 (providing that as prerequisite to obtaining liquor license, applicant must prove that it "is a corporation or association organized under the Utah Nonprofit Corporation and Cooperative Association Act").

STEWART, Associate Chief Justice, concurring in the result in part and dissenting in part:

I concur in the result with respect to the Elks Lodges and dissent with respect to the Moose Lodges. In my view, the Liquor Commission's suspension of the Moose Lodges' liquor licenses violates the Moose Lodge members' right of free association under the First Amendment to the United States Constitution.

The Alcoholic Beverage Control Commission conducted formal hearings to determine whether the petitioners discriminated in their membership practices. Solely on the basis of their articles and bylaws, the Commission ruled that the petitioners violated the Utah Civil Rights Act "by discriminating and denying full and equal accommodations, advantages, facilities, privileges, goods, and services on the basis of gender." On that ground, the Commission ruled that the Elks and the Moose were in violation of the "public policy of this state" and that their restrictive membership practices were inconsistent with the purposes of the private club chapter of the Alcoholic Beverages Control Act and suspended their private club liquor licenses. There is no evidence that the Moose Lodges have discriminated in serving liquor to women or anyone else. The revocation of their licenses is based solely on the membership restrictions in the Moose Lodges. Accordingly, the Commission's actions fail to pass constitutional muster. This Court's identical treatment of the two lodges reflects a fundamental misunderstanding of First Amendment jurisprudence and the application of civil rights legislation.

The Moose and Elks lodges have numerous similarities. Both are nonprofit fraternal organizations; both are local units of national orders. The national organizations of the two units prohibit women from membership in their lodges but allow women to become members of auxiliary organizations. Women are deemed guests in the lodges and have access to the social quarters and can purchase liquor.

It is the differences between the two organizations, however, that determine their positions under the law. The Elks Lodges operate public restaurants, offer their facilities to the public for parties and other social activities, and carry on the extensive catering business. They have no limits on the number of male members allowed and actively recruit and encourage men to join. The Elks Lodges also conduct activities in which nonmembers are allowed to participate. Acknowledging these factors, this Court recently ruled that an Elk's Lodge was a place of public accommodation. *Beynon v. St. George-Dixie Lodge #1743*, 854 P.2d 513 (Utah 1993). Thus, we held that it could not discriminate on the basis of gender because the lodge was a business enterprise regulated by the state and subject to the Utah Civil Rights Act. *Id.* at 519.

The Moose Lodges, on the other hand, are not places of public accommodation. They do not operate public restaurants and do not open their facilities to the public. Only members and prospective members are allowed inside their facilities. The Moose Lodges do not encourage nonmembers to participate in Moose Lodge activities. One becomes a member only by invitation. A nonmember guest must be a prospective member; the guest must sign

a register and after the second visit must become a member or not be allowed inside the facilities thereafter. As the United States Supreme Court found, "[The] Moose Lodge is a private club in the ordinary meaning of that term," and it did not become an arm of the state or a state agency by virtue of the fact that it held a state liquor license and was subject to significant regulation in dispensing liquor. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171 (1972). I submit that on these facts, the Moose Lodges are entitled to the constitutionally protected right of free association, which the State of Utah may not infringe by denying them a liquor license. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

The majority relies on *Beynon v. St. George-Dixie Lodge #1743*, 854 P.2d 513 (Utah 1993), in rejecting both the Elks and the Moose Lodges' claims to a constitutionally protected right of association. The majority states, "This court has already held that a private club's liquor license may be suspended for discriminating against women without encroaching upon the club members' rights of association" (citing *Beynon*). *Beynon* did not, however, address or even discuss the issue of the suspension of a liquor license by the Commission. Rather, the issue was whether the St. George-Dixie Elks Lodge could deny the plaintiff, a woman, membership in the lodge on the basis of gender. The Court held in effect that since the Elks provided a place of public accommodation, they could be regulated by the state and were subject to the Utah Civil Rights Act. *Beynon*, 854 P.2d at 515.

In short, the majority's opinion is grounded in its misreading of our holding in *Beynon*. Citing *Beynon*, the majority asserts that a private association's constitutional

right of free association is never infringed if it possesses a private club liquor license. That position is fundamentally at odds with the doctrine announced in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and is not supported by *Beynon*. *Beynon* explicitly avoided addressing the issue of the constitutional right of private associations to free association and its connection to the power of the state to regulate liquor: "We do not reach this issue because this case does not implicate the right to free association." *Beynon*, 854 P.2d at 518. Since the case presently before us does "implicate the right to free association," it is now necessary to examine the protection granted by the right to freedom of association and the effect that government licensure has on that right.

I. FREEDOM OF ASSOCIATION

A basic principle underlying this nation's system of limited government and its social system is the principle that all persons have the right to be left alone, to be free from government interference in their private associations. That right to freedom of association is constitutionally protected under two rationales. *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544-45 (1987); *Roberts*, 468 U.S. at 618. First, the Constitution prohibits undue state interference with a person's choice to enter into and maintain various intimate human relationships, including membership in social organizations. *Rotary Club*, 481 U.S. at 544. Second, the Constitution protects associational protections to safeguard the exercise of First Amendment rights of expression. *Id.*

A. Right to Social Interaction

The freedom to make personal bonds with others and to enter into social associations according to one's inclinations is essential to a free society. That freedom fosters diversity and acts as a critical buffer between the individual and the power of the state. *Roberts*, 468 U.S. at 619. "In this respect, freedom of association receives protection as a fundamental element of personal liberty." *Id.* at 618. Of course not all personal relationships implicate elements of personal liberty. *Id.* at 620. Determining the extent of state power to override personal choice in such matters "entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.* Relevant factors include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.*

The fundamental right to define one's identity necessarily includes the right to associate with those of one's own choosing. *Roberts*, 468 U.S. at 617-18. In *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), the Court stated:

> This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments. . . . "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."

372 U.S. at 543-44 (citations omitted) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

The First and Fourteenth Amendments therefore guarantee a significant degree of individual autonomy in choosing those with whom one wishes to associate on a social basis. *See Roberts*, 468 U.S. at 618-19. In the private sphere, individuals have the freedom to pursue their own inclinations as to purely social relationships without having to submit to a state-imposed orthodoxy. As to an individual's autonomy in choosing social relationships, Justice William O. Douglas stated:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting on unrelated ground); *see also Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) ("[I]t is the constitutional right of every person to close his home or club to any person. . . . ").

Freedom of association protects more than the right to associate for political purposes. It protects the individual from the power of the state to compel unwanted associations not only in highly intimate relationships such as marriage, but also in less intimate relationships such as social groups. Human nature requires social relationships; and those relationships should be of one's own

choosing, free of governmental compulsion or interference.

It is clear, of course, that the law does not tolerate customs or personal practices that discriminate against various groups by preventing them from freely participating in employment and from enjoying access to all public accommodations or essential public services. *E.g., Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). Nevertheless, zeal in extirpating indefensible discrimination from public life ought not be allowed to swallow the right of individuals to associate in purely social relationships with those whom they will. Clearly there is some tension between the need to prevent discrimination in the public sphere and freedom of association in the private sphere, but that cannot justify granting unwarranted predominance to one value at the expense of the other.

In *Roberts*, the Court stated that prohibiting discrimination in the allocation of publicly available goods and services furthered a compelling state interest and that by limiting that prohibition to *public, quasi-commercial conduct*, such as that engaged in by the Jaycees, the state "abridge[d] no more speech or associational freedom than [was] necessary to accomplish that purpose." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984). Nevertheless, the Court reemphasized the limits on state power over expressive association in stating:

> *There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.* Such a regulation may impair the ability of the original members to

> express only those views that brought them together. *Freedom of association therefore plainly presupposes a freedom not to associate.*

Id. at 622-23 (emphasis added).

Roberts thus holds that the characteristics of each association determine its associational freedoms. Although the record regarding those characteristics in this case is somewhat sparse because the Commission suspended the Moose and Elks Lodges' licenses solely on the basis of the lodges' bylaws, the available record facts all tend to support the conclusion that, according to *Roberts*, the Moose Lodges are private associations. Unlike the Jaycees and the Elks Lodges in this case, the Moose Lodges do not open their facilities or their activities to the public. Only members or first and second time prospective member guests are allowed inside the facilities. The Moose Lodges are selective in their membership and do not encourage nonmembers to participate. Accordingly, they have the constitutional right to associate with persons of their own choosing, and neither the state nor any regulatory agency has the power to impose membership restrictions on them; they can be as selective in their membership as they desire.

The majority claims that *Roberts* supports its position that the state may constitutionally impose its orthodoxy on private associates if they hold a liquor license. *Roberts* does not support that conclusion. *Roberts* held that the Jaycees, who excluded women from membership, was not an organization that had the characteristics of a private association and therefore was not entitled to a plenary right of free association. *Roberts*, 468 U.S. at 621, 623-29.

In holding that no freedom of intimate association was implicated in that case, the Court stated:

> [T]he local chapters of the Jaycees are neither small nor selective. Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers in that relationship. Accordingly, we conclude that the Jaycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women.

Id. at 621.

Contrary to the majority's claim, *Roberts* did not focus on the size of the national organization. It was Justice O'Connor, in her opinion concurring in part and concurring in the judgment, who discussed the size of the national organization and stated that it was undeserving of associational rights. *Roberts*, 468 U.S. at 631 (O'Connor, J., concurring in part & in judgment). The majority of the *Roberts* Court expressly focused on the size of the "*local* chapters of the Jaycees." 468 U.S. at 621. The lack of selectivity of both the local chapters and the national organization was another important factor, as was the fact that nonmembers, both women and men, already "participate[d] in a substantial portion of activities central to the decision of many members to associate with one another." *Id.*[1]

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[1] There is nothing in *Roberts* that indicates, as the majority asserts, that "less-than-strict observance of club rules and bylaws" was a factor in determining the associational rights of the Jaycees. In short, it is difficult to see how that factor can be a

B. Protection of Other First Amendment Activities

The second rationale supporting the right to freedom of association is the protection of the exercise of other First Amendment activities. *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987); *Roberts*, 468 U.S. at 622. "[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." *Roberts*, 468 U.S. at 622. When a state attempts to interfere "with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated." *Id.* at 618. I submit that freedom of association in both of its forms is implicated in this case with respect to the Moose Lodges.

II. GOVERNMENT LICENSURE AND THE RIGHT OF FREE ASSOCIATION

The majority also argues that the highly regulated nature of liquor distribution in Utah warrants the state's infringement of the right of free association because by accepting a liquor license, the Moose voluntarily acquired a public status and their private associational characteristics are therefore irrelevant. That conclusion has been rejected by the United States Supreme Court.

"focus" of the Court's opinion or "another element that exposed the Jaycees to state regulation."

The state's power to regulate liquor does not supersede all other provisions of the United States Constitution. The Twenty-first Amendment, which repealed Prohibition and granted states the power to regulate liquor, in essence created an exception to the normal operation of the Commerce Cause. *Craig v. Boren*, 429 U.S. 190, 205-06 (1976). That amendment was never intended to elevate state power to regulate liquor above rights guaranteed under the Constitution. *Id.*; *see also California v. LaRue*, 409 U.S. 109, 115 (1972); *Celebrity Club Inc. v. Utah Liquor Control Comm'n*, 657 P.2d 1293, 1299 (Utah 1982).

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

Craig, 429 U.S. at 206 (quoting Paul Brest, *Processes of Constitutional Decisionmaking, Cases and Materials*, 258 (1975)). Thus, notwithstanding its broad regulatory power over the importation, distribution, and sale of liquor, the state may not infringe other constitutionally protected rights without a compelling interest that arises out of the effects that liquor consumption may have on the public health, morals, and safety. *See California v. LaRue*, 409 U.S. 109 (1972) (holding that a regulation prohibiting licensed bars or nightclubs from displaying,

either live or on film, certain sexually explicit entertainment did not violate federal constitution).

In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972), the Court held that a state liquor license did not transform a private association that held such a license, a Moose Lodge, into a public or state entity, thereby empowering the state to ban the lodge's discriminatory practices. Like the statutory scheme in Utah, the statutes in *Moose Lodge* that governed the sale of liquor imposed "pervasive" regulation with respect to private clubs that had liquor licenses and limited the maximum number of licenses available to private clubs. Notwithstanding the pervasive regulation, the Court stated:

> [We have] never held, of course, *that discrimination by an otherwise private entity* would be violative of the Equal Protection Clause *if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever.*
>
> . . . .
>
> . . . However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.

Id. at 173, 176-77 (emphasis added). In short, the recipient of a state liquor license does not lose its status as a private entity and become an arm of the state by virtue of the license.

Notwithstanding the state's interest in eliminating discrimination in publicly offered accommodations,

goods, and services, including the disbursement of liquor, the state has no legitimate interest in overriding associational rights with respect to private organizations. *Beynon* did not hold that the Utah Civil Rights Act applied to all private club liquor licensees regardless of the nature of the private association and the right of its members to freedom of association. That issue simply was not before the Court. If the Legislature had attempted to make that Act apply to all associations, it would have violated the constitutional right to associational freedom of groups that were truly private.

The majority asserts that *Jones v. Mayer*, 392 U.S. 409 (1968), *United States v. Guest*, 383 U.S. 745 (1966), *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), stand for the proposition that when private individuals enter the public marketplace or work place they are transformed into publicly regulated entities. Therefore, the majority argues, because the Moose Lodges are "in the public sphere and in the stream of commerce, they voluntarily surrendered the rights they had in their private lives to discriminate."

The majority misconstrues those cases; they do not stand for the proposition that all entities in the "public sphere" surrender their right to freedom of association. In *Katzenbach*, *Heart of Atlanta*, and *Guest*, the Court held that businesses that provided public accommodations could not discriminate on the basis of race.[2] In *Jones*, the

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[2] The majority relies on *Katzenbach v. McClung*, 379 U.S 294 (1964), to support its assertion that conditioning the Moose

issue before the Court was whether Congress had power under the Thirteenth Amendment to prohibit private individuals from refusing to sell or rent real property on the basis of race. The Court held that the Amendment empowered Congress to secure for all citizens the right to inherit, purchase, lease, sell, and convey property. These rights were fundamental to the "maintenance of freedom. . . . A man who enjoys the civil rights mentioned in [42 U.S.C. § 1982] cannot be reduced to slavery." 392 U.S. at 443-44. Again, the case involved a situation in which a private individual, while opening up a service or a sale to the public, attempted to discriminate on the basis of race. Of course, a private individual or privately owned business that offers service to the public may be prohibited from discriminating. It does not follow that a private association that does not open itself to the public and exists only to provide congenial social relationships can be denied the right to be selective in its membership criteria.

The majority also argues that allowing private groups that sell liquor to discriminate lessens the availability of

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Lodges' receipt of a liquor license on its compliance with the Civil Rights Act is not unconstitutional. *Katzenbach* does not support this position. In *Katzenbach*, the owners of a public restaurant brought an action challenging the constitutionality of Title II of the Civil Rights Act of 1964, as applied to restaurants. The Court upheld the constitutionality of the Act on the basis of Congress' power under the Commerce Clause. There was no issue as to the restaurant owner's associational freedoms or as to an unconstitutional condition on the bestowal of a government privilege.

liquor over the counter to certain classes, such as minorities and women, and could result in the total exclusion of such groups from important business opportunities. The argument is untenable. Indeed, just such an argument was rejected in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972). There is absolutely no evidence in this case that there is any impediment to minorities in obtaining liquor. The majority simply conjures the abstract possibility of such a problem. The limited number of available private liquor club licenses falls far short of conferring on private associations anything like a monopoly in dispensing over-the-counter liquor in Utah. Furthermore, but for today's decision, any group of people could apply for a private liquor club license. The Act provides for restaurant liquor licenses in numbers greater than private liquor licenses for the "storage, sale, and consumption of liquor on premises operated as public restaurants." Utah Code Ann. § 32A-4-101. Restaurant liquor licensees are subject to substantially the same operational restrictions as those imposed on private club liquor licensees. *Cf.* Utah Code Ann. §§ 32A-4-206, 32A-5-107. Nothing prohibits any group or class of persons from entertaining business clients and personal friends in these establishments or denies them important social opportunities that accompany the regulated sale and consumption of liquor.

The majority further asserts that its "decision does not impose an unconstitutional condition upon the Elks or the Moose" because they "*voluntarily* surrendered" their private status by accepting a liquor license, and thus because its ruling "affects only that portion of petitioners' activities that are in the public sphere, it does not impinge upon the right to free association, a private

right." (Emphasis in original.) This analysis begs the following question: Does the regulatory scheme impose the condition of giving up the constitutional rights of freedom of association for the receipt of a benefit from the state?

Allowing a state to bestow benefits only on those willing to forego a constitutional right can be fundamentally destructive of our constitutional fabric. The Constitution was designed to protect those who wish to exercise their constitutional rights, even in ways contrary to the will of the majority. Except in unusual circumstances, benefits or privileges cannot be granted on condition that a person surrender a constitutional right. Although a state may deny benefits or privileges for a number of reasons, "[i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (invalidating unconstitutional condition in public employment); *see Shapiro v. Thompson*, 394 U.S. 618 (1969) (in welfare payments); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (in public employment); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (in unemployment compensation); *Speiser v. Randall*, 357 U.S. 513 (1958) (in tax exemption); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (in public highway access). "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. *This would allow the government to 'produce a result which [it] could not command direction.'* " *Perry*, 408 U.S. at 597 (emphasis added) (quoting *Speiser*, 357 U.S. at 526); *see Sherbert*, 374 U.S. at 405 ("[C]onditions upon

public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms.").

The heart of the doctrine of unconstitutional conditions denies the government the power to grant a privilege on condition of surrendering a constitutional right, except in exceptional circumstances. In *Frost*, the Court explained:

> *If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all.* It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost, 271 U.S. at 593-94 (emphasis added).

I submit that the state has no legitimate interest in dictating the membership practices of private associations in general, or the Moose Lodges in particular. Contrary to the majority's assertion, it is firmly established that private associations do not lose their private status and become instrumentalities of the state merely because they receive a license from the state. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *see also Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 F.2d 468, 472, 477-78 (3d Cir. 1986) (private club had right to enforce discriminatory trademark licensing agreement with local club regarding four Kiwanis service marks). *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis Int'l*, 374 N.Y.S.2d 265, 268-69 (N.Y. Sup. Ct. 1975) (private club had right to discriminate in its membership, even though it received a tax exemption). As *Roberts* made clear, it is the characteristics of the association which dictate whether it is

subject to laws regarding public accommodations. *Roberts*, 468 U.S. at 618-20.

The majority's decision, simply put, attempts to regulate that which the state has no power to regulate directly. It accomplishes this by granting a state-conferred privilege on condition that a constitutional right is relinquished. The majority states that by accepting a liquor license, private associations perform a "quasi-public" service and become public for purposes of the Civil Rights Act. They are free to remain "private" and not subject themselves to the state's membership criteria as long as they forego a liquor license, but they may not receive a liquor license and retain their right to freedom of association.

That rationale, I submit, would justify a host of unconstitutional state intrusions on individual rights. Such intrusions cannot be supported on the premise that the state can regulate that which it otherwise has no power to regulate so long as the recipient of a state "privilege" "voluntarily" relinquishes a constitutional right which the state seeks to defeat. This Court ought not, in my view, endorse such state paternalism in the granting of "privileges" on condition of yielding a right.

I submit the Commission erred in determining that the Moose Lodges violated the Civil Rights Act. I would reverse the commission's decision suspending the private club liquor licenses of the Moose Lodges.

Justice Russon concurs in Associate Chief Justice Stewart's opinion.

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BEFORE THE
UTAH ALCOHOLIC BEVERAGE
CONTROL COMMISSION

DEPARTMENT OF ALCOHOLIC, BEVERAGE CONTROL, Complainant, v. MOOSE LODGES: #2031 (Tooele) and #259 (Salt Lake City), Respondents.	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** Case No. 94-026-M 94-027-M

This Liquor License violation proceeding was brought by the Utah Department of Alcoholic Beverage Control (DABC) against Moose Lodges # 259 (Salt Lake City) and #2031 (Tooele) (collectively, Moose Lodges) for violation of the Commission's directive prohibiting private club liquor licensees from discriminating on the

basis of race, sex, or religion and from having discriminatory language in their By-laws or Articles of Incorporation.

A formal evidentiary hearing was held on November 19, 1994, at 11:00 a.m. before four members of the Alcoholic Beverage Control Commission, Chairman Jerry Fenn having recused himself from all aspects of this proceeding. After the hearing the Commission ordered, and the parties filed, post-hearing briefs. Final argument was heard on January 28, 1994, at 11:00 a.m. The DABC was represented by Frank D. Mylar, Assistant Attorney General and the Moose Lodges were represented by Harold G. Christensen and Richard A. Van Wagoner.

The Commission, after carefully reviewing the memoranda of the parties, hearing oral argument, and receiving both documentary and testimonial evidence, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Commission has jurisdiction over this matter pursuant to Utah Code Ann. § 32A-1-119 (Supp. 1993).

2. Moose Lodges #259 (Salt Lake City) and #2031 (Tooele) (Moose Lodges) are DABC private club liquor licensees under Chapter 5 of Title 32A of the Utah Code.

3. The Board of Trustees or Officers of these liquor licensees operate a private liquor club, referred to as "The Social Quarters," for the benefit of its members and guests.

4. The Moose Lodges are affiliates and local chapters of the National Loyal Order of the Moose (i.e. Moose

International and the Supreme Lodge) and as such are bound by the National Moose organization's By-Laws, constitution, and General Laws.

5. The local and national Moose Lodges' By-Laws, General Laws, and Constitution preclude women from full membership.

6. On June 29, 1993, the Commission issued a directive requiring all private club liquor licensees to attest to the DABC that they do not discriminate on the basis of race, sex, or religion and that their by-laws, constitutions, or articles of incorporation do not contain discriminatory language. The Commission further directed that the liquor licenses of all private clubs who failed to comply with this directive would be revoked.

7. The Moose Lodges failed to comply with the Commission's directive in that they failed to sign an unequivocal attestation that they do not discriminate and they failed to remove discriminatory language from their by-laws, constitution, and articles.

8. The Moose Lodges have violated and continue to violate the Utah Civil Rights Act, Utah Code Ann. § 13-7-1 through -4 (1992), by discriminating and denying full and equal accommodations, advantages, facilities, privileges, goods, and services on the basis of gender.

9. The practice of discrimination based upon gender has been declared in the Utah Civil Rights Act to endanger the "health, welfare, safety, and general welfare of this state and its inhabitants," and "violates the public policy of this state." Utah Code Ann. § 13-7-1 (1992).

10. The purposes of the Alcoholic Beverage Control Act are protection of the public health, peace, safety, welfare, and morals, Utah Code Ann. §§ 32A-1-103 and 104(3) (1991).

11. The By-Laws, Constitution, and operation of the Moose Lodges are not consistent with purposes of the private club chapter of the Act.

CONCLUSIONS OF LAW

Having made the above Findings of Fact, the commission enters the following Conclusions of Law:

1. The Commission has jurisdiction over the parties to, and the subject matter of, this proceeding.

2. The Commission may revoke a liquor license if the by-laws, constitution, or rules of a private club are not consistent with the purposes of the Alcoholic Beverage Control Act.

3. The Commission may revoke a license for a violation of the Utah Civil Rights Act.

4. The Moose Lodges' liquor licenses are subject to indefinite suspension, effective February 25, 1994.

ORDER

WHEREFORE: It is the Order of this Commission that the liquor licenses of Moose Lodges #259 (Salt Lake City) and #2031 (Tooele) be indefinitely suspended, effective February 25, 1994.

DATED 25th day of February, 1994.

Nicholas E. Hales Acting Chairman	J. Bonner Ritchie Commissioner
S. Chris Johnson Commissioner	Dale T. Browning Commissioner

TITLE 13, CHAPTER 7, UTAH CODE ANN. CIVIL RIGHTS

13-7-1. Policy and purposes of act.

It is hereby declared that the practice of discrimination on the basis of race, color, sex, religion, ancestry, or national origin in business establishments or places of public accommodation or in enterprises regulated by the state endangers the health, safety, and general welfare of this state and its inhabitants; and that such discrimination in business establishments or places of public accommodation or in enterprises regulated by the state, violates the public policy of this state. It is the purpose of this act to assure all citizens full and equal availability of all goods, services and facilities offered by business establishments and places of public accommodation and enterprises regulated by the state without discrimination because of race, color, sex, religion, ancestry, or national origin. The rules of common law that statutes in derogation thereof shall be strictly construed has no application to this act. This act shall be liberally construed with a view to promote the policy and purposes of the act and to promote justice. The remedies provided herein shall not be exclusive but shall be in addition to any other remedies available at law or equity.

13-7-2. Definitions.

(1) The term "place of public accommodation" includes every place, establishment, or facility of whatever kind, nature, or class that caters or offers its services, facilities, or goods to the general public for a fee or

charge, except, any establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; provided that any place, establishment, or facility that caters or offers its services, facilities, or goods to the general public gratuitously shall be within the definition of this term if it receives any substantial governmental subsidy or support; but the term shall not apply to any institution, church, any apartment house, club, or place of accommodation which is in its nature distinctly private except to the extent that it is open to the public.

(2) The term "person" includes one or more individuals, partnerships, associations, organizations, corporations, labor unions, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons.

(3) "Enterprises regulated by the state" means:

(a) all institutions subject to regulation under Title 70C, Utah Consumer Credit Code;

(b) all places of business which sell beer to consumers or house a state liquor store, as permitted by Title 32A, Alcoholic Beverage Control Act;

(c) all insurers regulated by Title 31A, Insurance Code; and

(d) all public utilities subject to regulation under Title 54, Public Utilities Act.

13-7-3. Equal right in business establishments, places of public accommodation, and enterprises regulated by the state.

All persons within the jurisdiction of this state are free and equal and are entitled to full and equal accommodations, advantages, facilities, privileges, goods and services in all business establishments and in all places of public accommodation, and by all enterprises regulated by the state of every kind whatsoever, without discrimination on the basis of race, color, sex, religion, ancestry or national origin. Nothing in this act shall be construed to deny any person the right to regulate the operation of a business establishment or place of public accommodation or an enterprise regulated by the state in a manner which applies uniformly to all persons without regard to race, color, sex, religion, ancestry, or national origin; or to deny any religious organization the right to regulate the operation and procedures of its establishments.

13-7-4. Business establishment, place of public accommodation, or enterprise regulated by the state denying rights deemed public nuisance – Investigation and conciliation – Action to enjoin – Civil action for damages – Expenses of defending action.

Any business establishment or place of public accommodation or enterprise regulated by the state in which a violation of the rights provided in Section 13-7-3 of this act occurs is a public nuisance. The operator of any such business establishment or place of public accommodation or enterprise regulated by the state shall be deemed

guilty of maintaining a public nuisance and may be enjoined as hereinafter provided.

(a) Upon application to the attorney general by any person denied the rights guaranteed by Section 13-7-3, the attorney general shall investigate and seek to conciliate the matter.

(b) An action to enjoin any nuisance defined in this section may be brought in the name of the state of Utah by the attorney general. Upon the trial of the cause, on finding that the material allegations of the complaint are true, the court shall order such nuisance to be abated, and enjoin all persons from maintaining or permitting such nuisance. When any injunction as herein provided has been granted it shall be binding upon the defendant and shall act as an injunction in personam against the defendant throughout the state.

(c) Any person who is denied the rights provided for in Section 13-7-3 shall have a civil action for damages and any other remedy available in law or equity against any person who denies him the rights provided for in Section 13-7-3 or who aids, incites or conspires to bring about such denial.

(d) Any business establishment or place of public accommodation or enterprises regulated by the state charged with maintaining a public nuisance in violation of this act, which is determined or found not to be in violation of this act, may be awarded all actual and necessary expenses incurred in defending such action, as determined and approved by the court having jurisdiction of the matter.

TITLE 32A, CHAPTER 5, UTAH CODE ANN. PRIVATE CLUB LIQUOR LICENSES

32A-5-101. Commission's power to license private clubs – Limitations.

(1) Before any private club may sell or allow the consumption of liquor on its premises, it shall first obtain a license from the commission as provided in this chapter.

(2) The commission may issue private club liquor licenses to social clubs, recreational, athletic, or kindred associates incorporated under the Utah Nonprofit Corporation and Cooperative Association Act, which desire to maintain premises upon which alcoholic beverages may be stored, sold, served, and consumed. All such licenses shall be issued in the name of an officer or director of the club or association.

(3) A nonprofit corporation, association, or club or any officer, director, managing agent, or employee of a nonprofit corporation, association, or club may not store, sell, serve or permit consumption of liquor upon its premises, under a permit issued by local authority or otherwise, unless a private club liquor license has been first issued by the commission. Violation of this subsection is a class A misdemeanor.

(4) Subject to this subsection, the commission may issue private club liquor licenses at places and in numbers as it considers necessary. The total number of private club liquor licenses may not at any time aggregate more than that number determined by dividing the population of the state by 7,000. Population shall be determined by the most recent United States decennial or

special census or by any other population determination made by the United States or state governments.

(a) The commission may issue seasonal private club liquor licenses to be established in areas and for periods as it considers necessary. A seasonal private club liquor license may not be operated for a period longer than nine consecutive months subject to the following restrictions:

(i) Licenses issued for operation during summer time periods are known as "Seasonal A" club licenses. The period of operation for a "Seasonal A" club license may begin as early as February 1 and may continue until October 31.

(ii) Licenses issued for operation during winter time periods are known as "Seasonal B" club licenses. The period of operation for a "Seasonal B" club license may begin as early as September 1 and may continue until May 31.

(iii) In determining the number of private club liquor licenses that the commission may issue under this section, seasonal licenses are counted as one half of one private club liquor license. Each "Seasonal A" license shall be paired with "Seasonal B" license and the total number of months that each combined pair may be issued for operation may not exceed 12 months for each calendar year.

(b) If the location, design, and construction of a hotel may require more than one private club location within the hotel to serve the

public convenience, the commission may authorize as many as three private club locations within the hotel under one license if the hotel has a minimum of 150 guest rooms and if all locations under the license are within the same hotel facility and on premises which are managed or operated and owned or leased by the licensee. Facilities other than hotels may not have more than one private club location under a single private club liquor license.

(5) (a) A private club licensee's premises may not be established within 600 feet of any public or private school, church, public library, public playground, or park, as measured by the method in Subsection (6).

(b) A private club licensee premises may not be established within 200 feet of any public or private school, church, public library, public playground, or park, measured in a straight line from the nearest entrance of the proposed outlet to the nearest property boundary of the public or private school, church, public library, public playground, or park.

(c) The restrictions contained in Subsections (a) and (b) govern unless one of the following exemptions applies:

(i) The commission finds after full investigation that the premises are located within a city of the third class or a town, and compliance with the distance requirements would result in peculiar and exceptional practical difficulties or exceptional and undue hardships in the granting of a private club license. In that event, the commission may, after giving full consideration

to all of the attending circumstances, following a public hearing in the city or town, and where practical in the neighborhood concerned, authorize a variance from the distance requirements to relieve the difficulties or hardships if the variance may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of this title.

(ii) With respect to the establishment of a private club licensee in any location, the commission may, after giving full consideration to all of the attending circumstances, following a public hearing in the county, and where practical in the neighborhood concerned, reduce the proximity requirements in relation to a church if the local governing body of the church in question gives its written approval.

(iii) Any on-premises beer retailer licensee existing on March 1, 1990, need not comply with the restrictions contained in Subsections (a) and (b) if it applies for a private club liquor license before January 1, 1991.

(6) With respect to any public or private school, church, public library, public playground, or park, the 600 foot limitation is measured from the nearest entrance of the outlet by following the shortest route of either ordinary pedestrian traffic, or where applicable, vehicular travel along public thoroughfares, whichever is the closer, to the property boundary of the public or private school, church, public library, public playground, or park.

(7) Nothing in this section prevents the commission from considering the proximity of any educational, religious, and recreational facility, or any other relevant factor in reaching a decision on whether to issue a private club liquor license. For purposes of this subsection, "educational facility" includes nursery schools, infant day care centers, and trade and technical schools.

32A-5-102. Application and renewal requirements.

(1) A person seeking a private club liquor license under this chapter shall file a written application with the department, in the name of an officer or director of a corporation, in a form prescribed by the department. It shall be accompanied by:

(a) a nonrefundable $1,000 application fee;

(b) an initial license fee of $750, which is refundable if a license is not granted;

(c) written consent of the local authority;

(d) A copy of the applicant's current business license;

(e) evidence that the applicant is a corporation or association organized under the Utah Nonprofit Corporation and Cooperative Association Act, and is in good standing;

(f) evidence of proximity to any public or private school, church, public library, public playground, or park, and if the proximity is within the 600 feet or 200 foot limitations of Subsections 32A-5-101(5), (6), and (7), the application shall be processed in accordance with those subsections;

(g) evidence that the applicant operates a club where a variety of food is prepared and served in connection with dining accommodations;

(h) a bond as specified by Section 32A-5-106;

(i) a floor plan of the club premises, including consumption areas and the area where the applicant proposes to keep and store liquor;

(j) evidence that the club is carrying public liability insurance in an amount and form satisfactory to the department;

(k) evidence that the club is carrying dramshop insurance coverage of at least $100,000 per occurrence and $300,000 in the aggregate;

(l) a copy of the club's articles, bylaws, house rules, and any amendments to those documents, which shall be kept on file with the department at all times;

(m) a signed consent form stating that the club and its management will permit any authorized representative of the commission, department, council, or any law enforcement officer unrestricted right to enter the club premises;

(n) a signed consent form authorizing the department to obtain Internal Revenue Service tax information on the club;

(o) a signed consent form authorizing the department to obtain state and county real and personal property tax information on the club;

(p) profit and loss statements for the previous fiscal year and pro forma statements for

one year if the applicant has not previously operated; and

(q) any other information, documents, and evidence the department may require by rule or policy to allow complete evaluation of the application.

(2) (a) Each application shall be signed and verified by oath or affirmation by an executive officer or any person specifically authorized by the corporation or association to sign the application, to which shall be attached written evidence of said authority.

(b) The applicant may attach to the application a verified copy of a letter of exemption from federal tax, issued by the United States Treasury Department, Internal Revenue Service, which the commission may consider as evidence of the applicant's nonprofit status. The commission may also consider the fact that the licensee has lost its tax exemption from federal tax as evidence that the licensee has ceased to operate as a nonprofit corporation.

(3) (a) The Commission may refuse to issue a license if it determines that any provisions of the club's articles, bylaws, house rules, or amendments to any of those documents are not reasonable and consistent with the declared nature and purpose of the applicant and the purposes of this chapter.

(b) Club bylaws shall include provisions respecting the following:

(i) standards of eligibility for members;

(ii) limitation of members, consistent with the nature and purpose of the corporation or association;

(iii) the period for which dues are paid, and the date upon which the period expires:

(iv) provisions for dropping members for the nonpayment of dues or other cause; and

(v) provisions for guests or visitors, if any, and for the issuance and use of visitor cards.

(4) All private club liquor licenses expire on June 30 of each year. Persons desiring to renew their private club liquor license shall submit a renewal fee of $750 and a completed renewal application to the department no later than May 31. Failure to meet the renewal requirements shall result in an automatic forfeiture of the license effective on the date the existing license expires. Renewal applications shall be in a form as prescribed by the department.

32A-5-103. Qualifications – Club organization and stock structure.

(1) Any club or association seeking a private club liquor license shall meet the following qualifications:

(a) Each member shall own one share of stock and no member or other person shall own or control, directly or indirectly, more than one share.

(b) At least 35% of the total number of outstanding shares shall be of a class that entitles each holder of that class to full voting rights and, upon liquidation, to an equal share of the equity of the corporation.

(c) If there is more than one class of outstanding stock, the total number of outstanding shares of the classes entitled to vote and share in the equity shall be at least 35% of the total number of outstanding stock of all classes.

(d) The voting stock of the club shall be subject to assessment for obligations of the club.

(e) The club shall be managed and operated by a governing board, which consists of at least five individuals, each of whom is a shareholder or voting member of the club and is elected by the holders of shares or members entitled to vote.

(f) The club shall post proper notice of all elections in a conspicuous place within the club premises not less than ten working days prior to the election.

(2) (a) In lieu of the requirements of Subsections (1)(a), (b), and (c), a corporation having no authorized, issued, or outstanding stock shall have at least 75% of all members as voting members with one vote each.

(b) Upon dissolution or sale of the corporation, either:

(i) each voting member shares equally in the equity; or

(ii) the assets revert to a national nonprofit organization that originally chartered

the Utah corporation whose bylaws require that the assets be distributed, after payment of debts, either immediately or after a period of time not exceeding ten years during which period the assets are held in trust, to a charitable organization or fund, or a nonprofit corporation qualified under this chapter.

(c) The voting members of any club qualifying under this subsection shall be subject to assessment for obligations of the club to the extent of unpaid membership fees, unless the membership has been previously terminated.

(3) The commission may not grant a private club liquor license to a club whose proprietor, officer, director, or managing agent has been:

(a) convicted of a felony under any federal or state law;

(b) convicted of any violation of any federal or state law or local ordinance concerning the sale, manufacture, distribution, warehousing, adulteration, or transportation of alcoholic beverages; or

(c) convicted of any crime involving moral turpitude.

(4) If any employee, proprietor, officer, director, or managing agent of a private club licensee is convicted of any offense designated in Subsection (3), the commission may take emergency action by immediately revoking the license according to the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act.

(5) Upon the arrest of any proprietor, officer, director, or managing agent of a private club liquor licensee on any charge set forth in Subsection (3), the director may take emergency action by immediately suspending the operation of the licensee for the period during which the criminal matter is being adjudicated.

(6) (a) (i) The commission may not grant a private club liquor license to any corporate applicant who had any type of license, agency, or permit issued under this title revoked within the last three years.

(ii) This proscription also applies if any managing agent, officer, or director of the applicant is or was a partner or managing agent of any partnership, or is or was a managing agent, officer, director, or stockholder who holds or held at least 20% of the total issued and outstanding stock of any corporation that had a liquor license, agency, or permit revoked with the last three years.

(b) The corporate applicant may not be granted a license if any managing agent, officer, or director of the applicant had a liquor license, agency, or permit revoked while acting in his individual capacity within the last three years.

(7) If any person or entity to whom a license has been issued under this chapter no longer possesses the qualifications required by this title for obtaining that license, the commission may suspend or revoke that license.

32A-5-104. Commission and department duties before granting licenses.

(1) Before a private club liquor license may be granted by the commission, the department shall conduct an investigation and may hold public hearings for the purpose of gathering information and making recommendations to the commission as to whether or not a license should be granted. The information shall be forwarded to the commission to aid in its determination.

(2) Before issuing any private club liquor license, the commission shall:

(a) determine that the applicant has complied with all basic qualifications and requirements for making application for a license as provided by Section 32A-5-102 and 32A-5-103, and that the application is complete;

(b) consider the locality within which the proposed private club liquor outlet is located including, but not limited to:

(i) physical characteristics such as condition of the premises, square footage, and parking availability; and

(ii) operational factors such as tourist traffic, proximity to and density of other state stores, package agencies, and licensed outlets, demographics, population to be served, and the extent of and proximity to any school, church, public library, public playground, or park;

(c) consider the applicant's ability to manage and operate a private club liquor license,

including but not limited to management experience, past retail liquor experience, and the type of management scheme employed by the private club;

(d) consider the nature or type of private club operation of the proposed liquor licensee, including but not limited to, the type of menu items offered and emphasized, the hours of operation, the seating capacity of the facility, and the gross sales of food items; and

(e) consider any other factor or circumstance it considers necessary.

32A-5-105. Utah Nonprofit Corporation and Cooperative Association Act applicable – Exceptions.

(1) The Utah Nonprofit Corporation and Cooperative Association Act is applicable to private club nonprofit corporations and associations. These corporations and associations enjoy the powers and privileges and are subject to the duties, restrictions, and liabilities of other nonprofit corporations. This chapter takes precedence in the event of any conflict with the Utah Nonprofit Corporation and Cooperative Association Act.

(2) Three or more individuals may incorporate a private club nonprofit corporation or association by filing articles of incorporation with the Division of Corporations and Commercial Code that meet requirements of the Utah Nonprofit Corporation and Cooperative Association Act. These articles shall also contain a statement that:

(a) the private club is a bona fide club or association, the object of which is not pecuniary profit;

(b) the private club is organized with actual participating members;

(c) the private club will not be used for permitting gambling or any other violation of the law or ordinance;

(d) no member of the club or any of its officers, directors, or trustees is under 21 years of age; and

(e) one of the purposes for which the corporation has been organized is for obtaining a license from the commission for the storage, sale, service, or consumption of liquor.

(3) The Division of Corporations and Commercial Code shall issue a corporate charter to a private club nonprofit corporation or association organized under this chapter only upon receipt of an endorsed affidavit from the department stating that a true and complete copy of the articles of incorporation have been delivered to the department and that the articles meet the requirements of the department as established by this chapter and the rules of the commission.

(4) Any persons knowingly incorporating under this chapter with the object of pecuniary profit, and all persons having possession of any charter issued under this section, but revoked by the Division of Corporations and Commercial Code, who refuse upon demand to deliver the charter so revoked, are guilty of a class B misdemeanor.

32A-5-106. Bond.

(1) Each private club liquor licensee shall post a cash or corporate surety bond in the penal sum of $10,000 payable to the department, which the licensee has procured and must maintain for so long as the licensee continues to operate as a private club liquor licensee.

(2) The bond shall be in a form approved by the attorney general, conditioned upon the licensee's faithful compliance with this title and the rules of the commission.

(3) If the $10,000 corporate surety bond is canceled due to the licensee's negligence, a $300 reinstatement fee may be assessed. No part of any cash or corporate bond so posted may be withdrawn during the period the license is in effect, or while revocation proceedings are pending against the licensee. A bond filed by a licensee may be forfeited if the license is finally revoked.

32A-5-107. Operational restrictions.

Each corporation or association granted a private club liquor license and its employees, officers, managing agent, and members shall comply with the following conditions and requirements. Failure to comply may result in a suspension or revocation of the license or other disciplinary action taken against individual employees or management personnel.

(1) Each private club shall hold regular meetings as required by its articles or bylaws and conduct its business through regularly elected officers. Within ten days following the election of any officer, the department shall be

notified in writing of the officer's name, address, and office to which the officer has been elected, and the term of that office.

(2) Each private club may admit members only on written application signed by the applicant, following investigation and approval of the governing body. Admissions shall be recorded in the official minutes of a regular meeting of the governing body and the application, whether approved or disapproved, shall be filed as a part of the official records of the licensee. An applicant may not be accorded the privileges of a member until a quorum of the governing body has formally voted upon and approved the applicant as a member. An applicant may not be admitted to membership until seven days after the application is submitted.

(3) Each private club shall maintain a current and complete membership record showing the date of application of each proposed member, the member's address, the date of admission following application, and the date initiation fees and dues were assessed and paid. the record shall also show the serial number of the membership card issued to each member. A current record shall also be kept indicating when members were dropped or resigned.

(4) Each private club shall establish in the club bylaws initial fees and monthly dues, as established by commission rules, which are collected from all members.

(5) Each private club may allow guests or visitors to use the premises only when previously authorized by a member. A member is responsible for all services extended to guests and visitors. If the guest or visitor is a

member of the same fraternal organization as the private club liquor licensee, no previous authorization is required.

(6) Each private club shall limit the issuance of visitor cards for a period not to exceed two weeks and assess and collect a fee from each visitor of not less than $5 for each two-week period the visitor card is issued. One dollar of every visitor card fee shall be remitted quarterly to the department for the administration of this title. A current record of the issuance of each card shall be maintained and shall contain the name of the member sponsoring the visitor.

(7) A private club may not sell alcoholic beverages to any person other than a member, guest, or visitor who holds a valid visitor card issued under Subsection (6).

(8) A person who is under 21 years of age may not be a member, officer, director, or trustee of a private club.

(9) An employee of a club, while on duty, may not consume an alcoholic beverage, be under the influence of alcoholic beverages, sponsor a person for visitor privileges, or act as a host for a guest.

(10) A visitor to a club may not host more than five guests at one time.

(11) Each private club shall maintain an expense ledger or record showing in detail all expenditures separated by payments for malt or brewed beverages, liquor, food, detailed payroll, entertainment, rent, utilities, supplies, and all other expenditures. This record shall be kept in a form approved by the department and balanced each month. Each expenditure shall be supported by

delivery tickets, invoices, receipted bills, canceled checks, petty cash vouchers, or other sustaining data or memoranda. All invoices and receipted bills for the current calendar or fiscal year documenting purchases made by officers of the club for the benefit of the club shall also be maintained.

(12) Each private club shall maintain a bank account that shows all income and expenditures as a control on the income and disbursements records. This account shall be balanced each month under the direction of the treasurer or other officer of the licensee.

(13) Each private club shall maintain a minute book that is posted currently by the secretary. This record shall contain the minutes of all regular and special meetings of the governing body and all committee meetings held to conduct club business. Membership lists shall also be maintained.

(14) Each private club shall maintain current copies of the club's articles of incorporation, current bylaws, and current house rules. Changes in the bylaws are not effective unless submitted to the department within ten days after adoption, and become effective 15 days after received by the department unless rejected by the department before the expiration of the 15-day period.

(15) Each private club shall maintain accounting and other records and documents as the department may require.

(16) Any club or person acting for the club, who knowingly forges, falsifies, alters, cancels, destroys, conceals, or removes the entries in any of the books of

account or other documents of the club required to be made, maintained, or preserved by this title or the rules of the commission for the purpose of deceiving the commission, council, or department, or any of their officials or employees, is subject to the immediate suspension or revocation of the club's license and possible criminal prosecution under Chapter 12.

(17) Each private club shall maintain and keep all the records required by this section and all other books, records, receipts, and disbursements maintained or utilized by the licensee, as the department requires, for a minimum period of three years. All records, books, receipts, and disbursements are subject to inspection by authorized representatives of the commission, department, and council. The club shall allow the department, through its auditors or examiners, to audit all records of the club at times the department considers advisable. The department shall audit the records of the licensee at least once annually.

(18) Each private club shall make available to the department, upon request, verified copies of any returns filed with the United States Treasury Department, Internal Revenue Service, under the federal Internal Revenue Code. Failure to provide any returns and supporting documents upon reasonable request by the department or alternatively, to provide evidence of an extension granted by the Internal Revenue Service, constitutes sufficient grounds for the commission to suspend or revoke a license. Any return or copy of a return so filed with the department is confidential and may not be used in any manner not directly connected with the enforcement of this title, nor may it be disclosed to any person or any

department or agency of government, whether federal, state, or local.

(19) Each private club shall own or lease premises suitable for its activities in its own name. A copy of the lease shall be filed with the department.

(20) Each private club shall operate the club under the supervision of a manager or house committee, appointed by the governing body of the club.

(21) A private club may not maintain facilities in any manner that barricades or conceals the club operation. Any member of the commission, authorized department personnel, member of the council, or any peace officer shall, upon presentation of credentials, be admitted immediately to the club and permitted without hindrance or delay to inspect completely the entire club premises and all books and records of the licensee, at any time during which the same are open for the transaction of business to its members.

(22) A private club may not pay any person or entity any fee, salary, rent, or other payment of any kind in excess of the fair market value for the service rendered, goods furnished, or facilities or equipment rented. It is the intention of this subsection to insure that no officer, managing agent, employee, or other person derives a principal economic benefit from the operation of a club.

(23) A private club may not engage in any public solicitation or public advertising calculated to increase its membership.

(24) Each private club shall comply with the following operational restrictions:

(a) The liquor storage and sales area shall remain locked at all times when it is not open for business.

(b) Liquor may not be purchased by a private club liquor licensee except from state stores or package agencies. Liquor so purchased may be transported by the licensee from the place of purchase to the licensed premises. Payment for liquor shall be made in accordance with rules established by the commission.

(c) Beginning July 1, 1991, a private club liquor licensee may not sell or provide any primary liquor except in one ounce quantities dispensed through a calibrated metered dispensing system approved by the department in accordance with commission rules adopted under this title, except that:

(i) liquor need not be dispensed through a calibrated metered dispensing system if used as a secondary flavoring ingredient in a beverage subject to the following restrictions:

(A) the beverage shall contain liquor from a lawfully purchased container;

(B) the secondary ingredient is not the only liquor in the beverage;

(C) the licensee shall designate a location where flavorings are stored on the floor plan provided to the department; and

(D) all flavoring containers shall be plainly and conspicuously labeled "flavorings";

(ii) liquor need not be dispensed through a calibrated metered dispensing system if used as a flavoring on desserts and in the preparation of flaming food dishes, drinks, and desserts;

(iii) wine may be served by the glass in quantities not exceeding five ounces per glass; and

(iv) heavy beer may be served in standard containers not exceeding one liter.

(d) (i) Private clubs licensed to sell liquor may sell beer in any size container not exceeding two liters, and on draft without obtaining a separate on-premise beer retailer license from the commission.

(ii) Private clubs licensed under this chapter that sell beer pursuant to Subsection (24)(d)(i) shall comply with all appropriate operational restrictions under Title 32A, Chapter 10, Beer Retailer Licenses, that apply to on-premise beer retailers except when those restrictions are inconsistent with or less restrictive than the operational restrictions under this chapter.

(iii) Failure to comply with the operational restrictions under Title 32A, Chapter 10, as set forth in Subsection (24)(d)(ii) may result in a suspension or revocation of the private club's state liquor license and its alcoholic beverage license issued by the local authority.

(e) Wine may be served in accordance with commission rule in containers not exceeding 750 ml.

(f) A private club may not charge for the service or supply of glasses, ice, or mixers unless the charges are fixed in the house rules of the club and a copy of the rules is kept on the club premises and available at all times for examination by the members, guests, and visitors to the club.

(g) Minors may not be employed by any club to sell, dispense, or handle any alcoholic beverage.

(h) An officer, director, managing agent, employee, and any other person employed by or acting for or in behalf of any licensee, may not sell, deliver, or furnish, or cause or permit to be sold, delivered, or furnished any liquor to any:

(i) minor;

(ii) person actually, apparently, or obviously drunk;

(iii) known habitual drunkard; or

(iv) known interdicted person.

(i) (i) Liquor may not be sold or offered for sale at any private club during the following days or hours:

(A) on the day of any regular general election, regular primary election, or statewide special election until after the polls are closed;

(B) on the day of any municipal, special district, or school election, but only within the boundaries of the municipality, special district, or school district, and only if closure is required by local ordinance; and

(C) on Sunday and any state or federal legal holiday after 12 midnight and before 12 noon.

(ii) The hours of beer sales are those specified in Chapter 10 for on-premise beer licensees.

(j) On all other days the liquor storage and sales area in the club shall be closed from 1 a.m. until 10 a.m.

(k) Liquor may not be sold except at prices fixed by the commission. Mixed drinks and wine may not be sold at discount prices on any date or at any time.

(l) Beginning July 1, 1991, no more than one ounce of primary liquor may be served to a member, guest, or visitor at a time, except wine as provided in Subsection (24)(c)(iii) and heavy beer as provided in Subsection (24)(c)(iv).

(m) (i) Beginning January 1, 1991, a person may not bring onto the premises of a private club liquor licensee any alcoholic beverage for on-premise consumption, except a person may bring, subject to the discretion of the licensee, cork-finished wine onto the premises of any private club liquor licensee and consume wine pursuant to Subsection (24)(n).

(ii) Beginning January 1, 1991, a private club or its officers, managers, employees, or agents may not allow a person to bring onto the private club premises any alcoholic beverage for on-premise consumption, except cork-finished wine under Subsection (24)(m)(i).

(iii) Beginning January 1, 1991, if any private club licensee or any of its officers, managers, employees, or agents violates this subsection:

(A) the commission may immediately suspend or revoke the private club's liquor license and the private club licensee is subject to criminal prosecution under Chapter 12; and

(B) the local authority may immediately suspend or revoke the private club's local liquor license, local consent under Subsection 32A-5-102(1)(c), or local business license.

(n) A wine service may be performed and a service charge assessed by the private club as authorized by commission rule for wine purchased at the private club or carried in by a member, guest, or visitor. If wine is carried in by a member, guest, or visitor, the member, guest or visitor shall deliver the wine to a server or other representative of the licensee upon entering the licensee premises.

(o) A member, guest, or visitor to a club may not carry from a club premises an open container used primarily for drinking purposes containing any alcoholic beverage.

(p) Each private club liquor licensee shall display in a prominent place in the private club:

(i) the private club liquor license that is issued by the department;

(ii) a list of the types and brand names of liquor being served through its calibrated metered dispensing system; and

(iii) a sign in large letters stating: "Warning: The consumption of alcoholic

beverages purchased in this establishment may be hazardous to your health and the safety of others."

(q) The following acts or conduct in a private club licensed under this chapter are considered contrary to the public welfare and morals, and are prohibited upon the premises:

(i) employing or using any person in the sale or service of alcoholic beverages while the person is unclothed or in attire, costume, or clothing that exposes to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva, or genitals;

(ii) employing or using the services of any person to mingle with the patrons while the person is unclothed or in attire costume or clothing described in Subsection (24)(q)(i);

(iii) encouraging or permitting any person to touch, caress, or fondle the breasts, buttocks, anus, or genitals of any other person;

(iv) permitting any employee or person to wear or use any device or covering, exposed to view, that simulates the breast, genitals, anus, pubic hair, or any portion of these;

(v) permitting any person to use artificial devices or inanimate objects to depict any of the prohibited activities described in this subsection;

(vi) permitting any person to remain in or upon the premises who exposes to

public view any portion of his or her genitals or anus; or

(vii) showing films, still pictures, electronic reproductions, or other visual reproductions depicting:

(A) acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts prohibited by Utah law;

(B) any person being touched, caressed, or fondled on the breast, buttocks, anus, or genitals;

(C) scenes wherein artificial devices or inanimate objects are used to depict, or drawings are used to portray, any of the prohibited activities described in this subsection; or

(D) scenes wherein a person displays the vulva or the anus or the genitals.

(r) Noting in Subsection (24)(q) precludes a local authority from being more restrictive of acts or conduct of the type prohibited in Subsection (24)(q).

(s) (i) Although [illegible] entertainment is permitted on the premises of a club liquor licensee, a licensee may not allow any person to perform or simulate sexual acts prohibited by Utah law, including sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or the touching, caressing, or fondling of the breast, buttocks, anus, or genitals, or the displaying

of the pubic hair, anus, vulva, or genitals. Entertainers shall perform only upon a stage or at a designated area approved by the commission.

(ii) Nothing in Subsection (24)(s)(i) precludes a local authority from being more restrictive of acts or conduct of the type prohibited in Subsection (24)(s)(i).

(25) A private club may not engage in or permit any form of gambling, as defined and proscribed in Title 76, Chapter 10, Part 11, Gambling, on the premises of the private club.

(26) (a) A private club may not close or cease operation for a period longer than 240 hours, unless written notice is given to the department at least seven days before the closing, and the closure or cessation of operation is first approved by the department.

(b) In the case of emergency closure, immediate notice of closure shall be made to the department by telephone.

(c) The department may authorize a closure or cessation of operation for a period not to exceed 60 days. The department may extend the initial period an additional 30 days upon written request of the private club and upon a showing of good cause. A closure or cessation of operation may not exceed a total of 90 days without commission approval.

(d) Any notice shall include the dates of closure or cessation of operation, the reason for the closure or cessation of operation, and the date on which the licensee will reopen or resume operation.

(e) Failure of the licensee to provide notice and to obtain department authorization prior to closure or cessation of operation shall result in an automatic forfeiture of the license and the forfeiture of the unused portion of the license fee for the remainder of the license year effective immediately.

(f) Failure of the licensee to reopen or resume operation by the approved date shall result in an automatic forfeiture of the license and the forfeiture of the unused portion of the club's license fee for the remainder of the license year.

(27) Each private club shall conduct its affairs so that it is not operated for a pecuniary profit.

(28) A private club may not transfer a private club liquor license from one location to another, without prior written approval of the commission.

(29) A person, having been granted a private club liquor license, may not sell, exchange, barter, give, or attempt in any way to dispose of the license, whether for monetary gain or not. A private club liquor license has no monetary value for the purpose of any type of disposition.

32A-5-108. Return of inventory.

Any liquor previously purchased from the department that remains unsold and in saleable condition at the time the licensee's private club liquor license becomes invalid for any reason shall be returned to the department for a refund of the current value of the liquor or the liquor is subject to immediate seizure by the department.

TITLE 32A, CHAPTER 4, UTAH CODE ANN. PUBLIC LIQUOR LICENSES

PART 1

RESTAURANT LIQUOR LICENSES

32A-4-101. Commission's power to grant licenses – Limitations.

(1) Before any restaurant may sell or allow the consumption of liquor on its premises, it shall first obtain a license from the commission as provided in this part.

(2) The commission may issue restaurant liquor licenses for the purpose of establishing restaurant liquor outlets at places and in numbers it considers proper for the storage, sale, and consumption of liquor on premises operated as public restaurants.

(3) Subject to this subsection, the total number of restaurant liquor licenses may not at any time aggregate more than that number determined by dividing the population of the state by 4,500. Population shall be determined by the most recent United States decennial or special census or by any other population determination made by the United States or state governments.

(a) The commission may issue seasonal restaurant liquor licenses established in areas and for periods it considers necessary. A seasonal restaurant liquor license may not be operated for a period longer than nine consecutive months subject to the following restrictions.

(i) Licenses issued for operating during summer time periods are known as "Seasonal A" restaurant licenses. The

period of operation for a "Seasonal A" restaurant license may begin as early as February 1 and may continue until October 31.

(ii) Licenses issued for operation during winter time periods are known as "Seasonal B" restaurant licenses. The period of operation for a "Seasonal B" restaurant license may begin as early as September 1 and may continue until May 31.

(iii) In determining the number of restaurant liquor licenses that the commission may issue under this section, seasonal licenses are counted as one half of one restaurant liquor license. Each "Seasonal A" license shall be paired with a "Seasonal B" license and the total number of months that each combined pair may be issued for operation may not exceed 12 months for each calendar year.

(b) If the location, design, and construction of a hotel may require more than one restaurant liquor sales location within the hotel to serve the public convenience, the commission may authorize the sale of liquor at as many as three restaurant locations within the hotel under one license if the hotel has a minimum of 150 guest rooms and if all locations under the license are within the same hotel facility and on premises that are managed or operated and owned or leased by the licensee. Facilities other than hotels shall have a separate restaurant liquor license for each restaurant where liquor is sold.

(4) (a) Restaurant liquor licensee premises may not be established within 600 feet of any public or private school, church, public library, public

playground, or park, as measured by the method in Subsection (5).

(b) Restaurant liquor licensee premises may not be established within 200 feet of any public or private school, church, public library, public playground, or park, measured in a straight line from the nearest entrance of the proposed outlet to the nearest property boundary of the public or private school, church, public library, public playground or park.

(c) The restrictions contained in Subsections (a) and (b) govern unless one of the following exemptions applies:

(i) The commission finds after full investigation that the premises are located within a city of the third class or a town, and compliance with the distance requirements would result in peculiar and exceptional practical difficulties or exceptional and undue hardships in the granting of a restaurant liquor license. In that event, the commission may, after giving full consideration to all of the attending circumstances, following a public hearing in the city or town, and where practical in the neighborhood concerned, authorize a variance from the distance requirements to relieve the difficulties or hardships if the variance may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of this title.

(ii) With respect to the establishment of a restaurant licensee in any location, the commission may, after giving full consideration to all of the attending circumstances,

following a public hearing in the county, and where practical in the neighborhood concerned, reduce the proximity requirements in relation to a church if the local governing body of the church in question gives its written approval.

(iii) Any on-premises beer retailer licensee existing on March 1, 1990, need not comply with the restrictions contained in Subsections (a) and (b) if it applies for a restaurant liquor license before January 1, 1991.

(5) With respect to any public or private school, church, public library, public playground, or park, the 600 foot limitation is measured from the nearest entrance of the outlet by following the shortest route of either ordinary pedestrian traffic, or where applicable, vehicular travel along public thoroughfares, whichever is the closer, to the property boundary of the public or private school, church, public library, public playground, school playground, or park.

(6) Nothing in this section prevents the commission from considering the proximity of any educational, religious, and recreational facility, or any other relevant factor in reaching a decision on a proposed location. For purposes of this subsection, "educational facility" includes nursery schools, infant day care centers, and trade and technical schools.

32A-4-102. Application and renewal requirements.

(1) A person seeking a restaurant liquor license under this chapter shall file a written application with the

department, in a form prescribed by the department. It shall be accompanied by:

(a) a nonrefundable $300 application fee;

(b) an initial license fee of $300, which is refundable if a license is not granted;

(c) written consent of the local authority;

(d) a copy of the applicant's current business license;

(e) evidence of proximity to any public or private school, church, public library, public playground or park, and if the proximity is within the 600 feet or 200 foot limitation of Subsections 32A-4-101(4), (5), and (6), the application shall be processed in accordance with those subsections;

(f) a bond as specified by Section 32A-4-105;

(g) a floor plan of the restaurant, including consumption areas and the area where the applicant proposes to keep, store, and sell liquor;

(h) evidence that the restaurant is carrying public liability insurance in an amount and form satisfactory to the department;

(i) evidence that the restaurant is carrying dramshop insurance coverage of at least $100,000 per occurrence and $300,000 in the aggregate;

(j) a signed consent form stating that the restaurant will permit any authorized representative of the commission, department, council,

or any law enforcement officer unrestricted right to enter the restaurant;

(k) in the case of a corporate applicant, proper verification evidencing that the person or persons signing the restaurant application are authorized to so act on the corporation's behalf; and

(l) any other information the commission or department may require.

(2) All restaurant liquor licenses expire on October 31 of each year. Persons desiring to renew their restaurant liquor license shall submit a renewal fee of $300 and a completed renewal application to the department no later than September 30. Failure to meet the renewal requirements shall result in an automatic forfeiture of the license effective on the date the existing license expires. Renewal applications shall be in a form as prescribed by the department.

(3) If any restaurant liquor licensee does not immediately notify the department of any change in ownership of the restaurant, or in the case of a Utah corporate owner of any change in the corporate officers or directors, the commission may suspend or revoke that license.

32A-4-103. Qualifications.

(1) (a) The commission may not grant a restaurant liquor license to a restaurant whose proprietor has been convicted of:

(i) a felony under any federal or state law;

(ii) any violation of any federal or state law or local ordinance concerning the sale, manufacture, distribution, warehousing, adulteration, or transportation of alcoholic beverages; or

(iii) any crime involving moral turpitude.

(b) In the case of a partnership or corporation, the proscription under Subsection (a) applies if any partner, managing agent, officer, director, or stockholder who holds at least 20% of the total issued and outstanding stock of an applicant corporation has been convicted of any offense as provided in this subsection.

(2) (a) If any employee or proprietor of a restaurant liquor licensee is convicted of any offense designated in Subsection (1), the commission may take emergency action by immediately revoking the license according to the procedures and requirements of Title 63, Chapter 46b.

(b) In the case of a partnership or corporation that has been granted a restaurant liquor license, if any partner, managing agent, officer, director, or stockholder who holds at least 20% of the total issued and outstanding stock of a corporation is convicted of any offense designated in Subsection (1), the commission may take emergency action by immediately revoking the license according to the procedures and requirements of Title 63, Chapter 46b.

(3) Upon the arrest of any restaurant liquor licensee on any charge set forth in Subsection (1), the director may take emergency action by immediately suspending the

operation of the licensee according to the procedures and requirements of Title 63, Chapter 46b, for the period during which the criminal matter is being adjudicated.

(4) (a) (i) The commission may not grant a restaurant liquor license to any person who has had any type of license, agency, or permit issued under this title revoked within the last three years.

(ii) The commission may not grant a restaurant liquor license to any corporation or partnership applicant if any partner, managing agent, officer, director, or stockholder who holds at least 20% of the total issued and outstanding stock of the applicant is or was a partner or managing agent of any partnership, or is or was a managing agent, officer, director, or a stockholder who holds or held at least 20% of the total issued and outstanding stock of any corporation that had a liquor license, agency, or permit revoked within the last three years.

(b) A corporation or partnership applicant may not be granted a restaurant liquor license if any partner or managing agent of the partnership or any managing agent, officer, director, or stockholder who holds at least 20% of the total issued and outstanding stock of the corporate applicant had a liquor license, agency, or permit revoked while acting in their individual capacity within the last three years.

(c) A person acting in an individual capacity may not be granted a restaurant liquor license if that person was a partner or managing agent of a partnership, or a management agent, officer, director, or stockholder who held at least

20% of the total issued and outstanding stock of a corporation that had a liquor license, agency, or permit revoked within the last three years.

(5) A minor may not be granted a restaurant liquor license.

(6) If any person to whom a license has been issued under this part no longer possesses the qualifications required by this title for obtaining that license, the commission may suspend or revoke that license.

32A-4-104. Commission and department duties before granting licenses.

(1) Before a restaurant liquor license may be granted by the commission, the department shall conduct an investigation and may hold public hearings for the purpose of gathering information and making recommendations to the commission as to whether or not a license should be granted. This information shall be forwarded to the commission to aid in its determination.

(2) Before issuing any restaurant liquor license, the commission shall:

(a) determine that the applicant has complied with all basic qualifications and requirements for making application for a license as provided by Sections 32A-4-102 and 32A-4-103, and that the application is complete;

(b) consider the locality within which the proposed restaurant liquor outlet is located, including but not limited to:

(i) physical characteristics such as condition of the premises, square footage, and parking availability; and

(ii) operational factors such as tourist traffic, proximity to and density of other state stores, package agencies, and outlets, demographics, population to be served, and the extent of and proximity to any school, church, public library, public playground, or park;

(c) consider the applicant's ability to manage and operate a restaurant liquor license, including but not limited to management experience, past retail liquor experience, and the type of management scheme employed by the restaurant;

(d) consider the nature or type of restaurant operation of the proposed liquor licensee, including but not limited to, the type of menu items offered and emphasized, whether the restaurant emphasizes service to an adult clientele or to minors, the hours of operation, the seating capacity of the facility, and the gross sales of food items; and

(e) consider any other factors or circumstances it considers necessary.

32A-4-105. Bond.

(1) Each restaurant liquor licensee shall post a cash or corporate surety bond in the penal sum of $5,000 payable to the department, which the licensee has procured and must maintain for sc long as the licensee continues to operate as a restaurant liquor licensee.

(2) The bond shall be in a form approved by the attorney general, conditioned upon the licensee's faithful compliance with this title and the rules of the commission.

(3) If the $5,000 surety bond is canceled due to the licensee's negligence, a $300 reinstatement fee may be assessed. No part of any cash or corporate bond so posted may be withdrawn during the period the license is in effect, or while revocation proceedings are pending against the licensee. A bond filed by a licensee may be forfeited if the license is finally revoked.

32A-4-106. Operational restrictions.

Each person granted a restaurant liquor license and the employees and management personnel of the restaurant shall comply with the following conditions and requirements. Failure to comply may result in a suspension or revocation of the license or other disciplinary action taken against individual employees or management personnel.

(1) Liquor may not be purchased by a restaurant liquor licensee except from state stores or package agencies. Liquor purchased may be transported by the licensee from the place of purchase to the licensed premises. Payment for liquor shall be made in accordance with rules established by the commission.

(2) Beginning July 1, 1991, a restaurant liquor licensee may not sell or provide any primary liquor except in one ounce quantities dispensed through a calibrated metered dispensing system approved by the

department in accordance with commission rules adopted under this title, except that:

(a) liquor need not be dispensed through a calibrated metered dispensing system if used as a secondary flavoring ingredient in a beverage subject to the following restrictions:

(i) the secondary ingredient may be dispensed only in conjunction with the purchase of a primary liquor;

(ii) the secondary ingredient is not the only liquor in the beverage;

(iii) the licensee shall designate a location where flavorings are stored on the floor plan provided to the department; and

(iv) all flavoring containers shall be plainly and conspicuously labeled "flavorings";

(b) liquor need not be dispensed through a calibrated metered dispensing system if used as a flavoring on desserts and in the preparation of flaming food dishes, drinks, and desserts;

(c) wine may be served by the glass in quantities not exceeding five ounces per glass; and

(d) heavy beer may be served in original containers not exceeding one liter.

(3) (a) Restaurants licensed to sell liquor may sell beer in any size container not exceeding two liters, and on draft for on-premise consumption without obtaining a separate on-premise beer retailer license from the commission.

(b) Restaurants licensed under this chapter that sell beer pursuant to Subsection (3)(a) shall comply with all appropriate operational restrictions under Chapter 10 that apply to on-premise beer retailers except when those restrictions are inconsistent with or less restrictive than the operational restrictions under this chapter.

(c) Failure to comply with the operational restrictions under Chapter 10 as set forth in Subsection (3)(b) may result in a suspension or revocation of the restaurant's state liquor license and its alcoholic beverage license issued by the local authority.

(4) Wine may be served in accordance with commission rule in containers not exceeding 750 ml.

(5) (a) Liquor may not be stored or sold in any place other than as designated in the licensee's application, unless the licensee first applies for and receives approval from the department for a change of location within the restaurant.

(b) A patron or guest may only make purchases in the restaurant from a server designated and trained by the licensee.

(c) Any alcoholic beverage may only be consumed at the patron's or guest's table.

(d) Liquor may not be stored where it is visible to patrons of the restaurant.

(6) Alcoholic beverages may not be dispensed directly to a patron or guest from the storage area but shall be delivered by a server to the patron.

(7) The liquor storage area shall remain locked at all times other than those hours and days when liquor sales are authorized by law.

(8) Liquor may not be sold or offered for sale at a restaurant during the following days or hours:

(i) on the day of any regular general election, regular primary election, or statewide special election until after the polls are closed;

(ii) on the day of any municipal, special district, or school election, but only within the boundaries of the municipality, special district, or school district, and only if closure is required by local ordinance;

(iii) on any other day after 12 midnight and before 12 noon.

(b) The hours of beer sales are those specified in Chapter 10 for on-premise beer licensees.

(9) Alcoholic beverages may not be sold except in connection with an order for food prepared, sold, and served at the restaurant.

(10) Alcoholic beverages may not be sold, delivered, or furnished to any:

(a) minor;

(b) person actually, apparently, or obviously drunk;

(c) known habitual drunkard; or

(d) known interdicted person.

(11) Liquor may not be sold except at prices fixed by the commission. Mixed drinks and wine may not be sold at discount prices on any date or at any time.

(12) A restaurant patron or guest may have only one alcoholic beverage at a time before him on his table.

(13) Beginning July 1, 1991, no more than one ounce of primary liquor may be served to a patron or guest at a time, except wine as provided in Subsection (2)(c) and heavy beer as provided in Subsection (2)(d).

(14) Alcoholic beverages may not be purchased by the licensee, or any employee or agent of the licensee, for patrons or guests of the restaurant.

(15) Alcoholic beverages purchased in a restaurant may not be served or consumed at any location where they are stored or dispensed.

(16) A wine service may be performed and a service charge assessed by the restaurant as authorized by commission rule for wine purchased at the restaurant or carried in by a patron. If wine is carried in by a patron, the patron shall deliver the wine to a server or other representative of the licensee upon entering the licensee premises.

(17) (a) Beginning January 1, 1991, a person may not bring onto the premises of a restaurant liquor licensee any alcoholic beverage for on-premise consumption, except a person may bring, subject to the discretion of the licensee, cork-finished wine onto the premises of any restaurant liquor licensee and consume wine pursuant to Subsection (16).

(b) Beginning January 1, 1991, a restaurant, licensed or unlicensed under this title, or its officers, managers, employees, or agents may not allow a person to bring onto the restaurant premises any alcoholic beverage for on-premise consumption or allow consumption of any such alcoholic beverage on its premises, except cork-finished wine under Subsection (a).

(c) Beginning January 1, 1991, if any restaurant licensee, or any of its officers, managers, employees, or agents violates Subsection (17):

(i) the commission may immediately suspend or revoke the restaurant's liquor license and the restaurant licensee is subject to possible criminal prosecution under Chapter 12; and

(ii) the local authority may immediately suspend or revoke the restaurant's local liquor license, local consent under Subsection 32A-4-102(1)(c), or local business license.

(18) Alcoholic beverages purchased from the restaurant may not be removed from the restaurant premises.

(19) Minors may not be employed by a restaurant licensee to sell or dispense alcoholic beverages.

(20) An employee of a restaurant liquor licensee, while on duty, may not consume an alcoholic beverage or be under the influence of alcoholic beverages.

(21) (a) Advertising or other reference to the sale of liquor and wine is not allowed on a food menu except that a statement of availability of a liquor and wine menu on request, the content

and form of which is approved by the department, may be attached to or carried on a food menu. The context of both food and liquor and wine menus may not in any manner attempt to promote or increase the sale of alcoholic beverages.

(b) A server, employee, or agent of a licensee may not draw attention to the availability of alcoholic beverages for sale, unless a patron or guest first inquires about it.

(c) Any set-up charge, service charge, chilling fee, or any other charge or fee made in connection with the sale, service, or consumption of liquor may be stated in food or alcoholic beverage menus.

(22) Each restaurant liquor licensee shall display in a prominent place in the restaurant:

(a) the liquor license that is issued by the department;

(b) a list of the types and brand names of liquor being served through its calibrated metered dispensing system; and

(c) a sign in large letters stating: "Warning: The consumption of alcoholic beverages purchased in this establishment may be hazardous to your health and the safety of others."

(23) The following acts or conduct in a restaurant licensed under this chapter are considered contrary to the public welfare and morals, and are prohibited upon the premises:

(a) employing or using any person in the sale or service of alcoholic beverages while the

person is unclothed or in attire, costume, or clothing that exposes to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva, or genitals;

(b) employing or using the services of any person to mingle with the patrons while the person is unclothed or in attire, costume, or clothing described in Subsection (23)(a);

(c) encouraging or permitting any person to touch, caress, or fondle the breasts, buttocks, anus, or genitals of any other person;

(d) permitting any employee or person to wear or use any device or covering, exposed to view, that simulates the breast, genitals, anus, pubic hair, or any portion of these;

(e) permitting any person to use artificial devices or inanimate objects to depict any of the prohibited activities described in this subsection;

(f) permitting any person to remain in or upon the premises who exposes to public view any portion of his or her genitals or anus; or

(g) showing films, still pictures, electronic reproductions, or other visual reproductions depicting:

(i) acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts prohibited by Utah law;

(ii) any person being touched, caressed, or fondled on the breast, buttocks, anus, or genitals;

(iii) scenes wherein artificial devices or inanimate objects are used to depict, or drawings are used to portray, any of the prohibited activities described in this subsection; or

(iv) scenes wherein a person displays the vulva or the anus or the genitals.

(24) Nothing in Subsection (23) precludes a local authority from being more restrictive of acts or conduct of the type prohibited in Subsection (23).

(25) (a) Although live entertainment is permitted on the premises of a restaurant liquor licensee, a licensee may not allow any person to perform or simulate sexual acts prohibited by Utah law, including sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, the touching, caressing, or fondling of the breast, buttocks, anus, or genitals, or the displaying of the pubic hair, anus, vulva, or genitals. Entertainers shall perform only upon a stage or at a designated area approved by the commission.

(b) Noting in Subsection (25)(a) precludes a local authority from being more restrictive of acts or conduct of the type prohibited in Subsection (25)(a).

(26) A restaurant liquor licensee may not engage in or permit any form of gambling, as defined and proscribed by Title 76, Chapter 10, Part 11, Gambling, on the premises of the restaurant liquor licensee.

(27) (a) Each restaurant liquor licensee shall maintain an expense ledger or record showing in detail:

(i) quarterly expenditures made separately for malt or brewed beverages, setups, liquor, food, and all other items required by the department; and

(ii) sales made separately for malt or brewed beverages, setups, food, and all other items required by the department.

(b) This record shall be kept in a form approved by the department and shall be kept current for each three-month period. Each expenditure shall be supported by delivery tickets, invoices, receipted bills, canceled checks, petty cash vouchers, or other sustaining data or memoranda.

(28) Each restaurant liquor licensee shall maintain accounting and other records and documents as the department may require. Any restaurant or person acting for the restaurant, who knowingly forges, falsifies, alters, cancels, destroys, conceals, or removes the entries in any of the books of account or other documents of the restaurant required to be made, maintained, or preserved by this title or the rules of the commission for the purpose of deceiving the commission, council, or department, or any of their officials or employees, is subject to the immediate suspension or revocation of the restaurant's liquor license and possible criminal prosecution under Chapter 12.

(29) (a) A restaurant liquor licensee may not close or cease operation for a period longer than 240 hours, unless written notice is given to the department at least seven days before the closing, and the closure or cessation of operation is first approved by the department.

(b) In the case of emergency closure, immediate notice of closure shall be made to the department by telephone.

(c) The department may authorize a closure or cessation of operation for a period not to exceed 60 days. The department may extend the initial period an additional 30 days upon written request of the restaurant licensee and upon a showing of good cause. A closure or cessation of operation may not exceed a total of 90 days without commission approval.

(d) Any notice shall include the dates of closure or cessation of operation, the reason for the closure or cessation of operation, and the date on which the licensee will reopen or resume operation.

(e) Failure of the licensee to provide notice and to obtain department authorization prior to closure or cessation of operation shall result in an automatic forfeiture of the license and the forfeiture of the unused portion of the license fee for the remainder of the license year effective immediately.

(f) Failure of the licensee to reopen or resume operation by the approved date shall result in an automatic forfeiture of the license and the forfeiture of the unused portion of the license free for the remainder of the license year.

(30) Each restaurant liquor licensee shall maintain at least 70% of its total restaurant business from the sale of food, which does not include mix for alcoholic beverages or service charges.

(31) There shall be no transfer of a restaurant liquor license from one location to another, without prior written approval of the commission.

(32) (a) A person, having been granted a restaurant liquor license may not sell, exchange, barter, give, or attempt in any way to dispose of the license whether for monetary gain or not.

(b) A restaurant liquor license has no monetary value for the purpose of any type of disposition.

(33) Each server of alcoholic beverages in a licensee's establishment shall keep a written beverage tab for each table or group that orders or consumes alcoholic beverages on the premises. The beverage tab shall list the type and amount of alcoholic beverages ordered or consumed.

(34) A person's willingness to serve alcoholic beverages may not be made a condition of employment as a server with a restaurant that has a restaurant liquor license.

32A-4-107. Return of inventory.

Any liquor previously purchased from the department that remains unsold and in saleable condition at the time the licensee's restaurant liquor license becomes invalid for any reason shall be returned to the department for a refund of the current value of the liquor or the liquor is subject to immediate seizure by the department.

PART 2

AIRPORT LOUNGE LIQUOR LICENSES

32A-4-201. Commission's power to grant licenses – Limitations.

(1) Before any airport lounge may sell or allow the consumption of liquor on its premises, it shall first obtain a license from the commission as provided in this part.

(2) The commission may issue airport lounge liquor licenses for the purpose of establishing airport liquor outlets at international airports for the storage, sale, and consumption of liquor on premises operated as public airport lounges.

(3) The total number of airport lounge liquor licenses may not exceed one lounge per terminal plus one lounge per concourse located beyond the security point at that international airport.

32A-4-202. Application and renewal requirements.

(1) A person seeking an airport lounge liquor license under this part shall file a written application with the department, in a form prescribed by the department, accompanied by:

(a) a nonrefundable $1,000 application fee;

(b) an initial license fee of $1,000, which is refundable if a license is not granted;

(c) written consent of the local and airport authority;

(d) a copy of the applicant's current business license;

(e) a bond as specified by Section 32A-4-205;

(f) a floor plan of the airport lounge, including consumption areas and the area where the applicant proposes to keep, store, and sell liquor;

(g) a copy of the sign proposed to be used by the licensee on its premises to inform the public that alcoholic beverages are sold and consumed there;

(h) evidence that the airport lounge is carrying public liability insurance in an amount and form satisfactory to the department;

(i) evidence that the airport lounge is carrying dramshop insurance coverage of at least $100,000 per occurrence and $300,000 in the aggregate;

(j) a signed consent form stating that the airport lounge will permit any authorized representative of the commission, department, council, or any law enforcement officer unrestricted right to enter the airport lounge;

(k) in the case of a corporate applicant, proper verification evidencing that the person or persons signing the airport lounge application are authorized to so act on the corporation's behalf; and

(l) any other information the commission or department may require.

(2) All airport lounge liquor licenses expire on October 31 of each year. Persons desiring to renew their airport lounge liquor license shall submit a renewal fee of

$1,000 and a completed renewal application to the department no later than September 30. Failure to meet the renewal requirements shall result in an automatic forfeiture of the license, effective on the date the existing license expires. Renewal applications shall be in a form as prescribed by the department.

(3) If any airport liquor licensee does not immediately notify the department of any change in ownership of the licensee, or in the case of a Utah corporate owner of any change in the corporate officers or directors, the commission may suspend or revoke that license.

32A-4-203. Qualifications.

(1) (a) The commission may not grant an airport lounge liquor license to an airport lounge whose proprietor has been convicted of:

(i) a felony under any federal or state law;

(ii) any violation of any federal or state law or local ordinance concerning the sale, manufacture, distribution, warehousing, adulteration, or transportation of alcoholic beverages; or

(iii) any crime involving moral turpitude.

(b) In the case of a partnership or corporation, the proscription under Subsection (1) applies if any partner, managing agent, officer, director, or stockholder who holds at least 20% of the total issued and outstanding stock of an applicant corporation has been convicted of any offense as provided in this subsection.

(2) (a) If any employee or proprietor of an airport lounge liquor licensee is convicted of any offense designated in Subsection (1), the commission may take emergency action by immediately revoking the license according to the procedures and requirements of Title 63, Chapter 46b.

(b) In the case of a partnership or corporation that has been granted an airport lounge liquor license, if any partner, managing agent, officer, director, or stockholder who holds at least 20% of the total issued and outstanding stock of a corporation is convicted of any offense designated in Subsection (1), the commission may take emergency action by immediately revoking the license according to the procedures and requirements of Title 63, Chapter 46b.

(3) Upon the arrest of any airport lounge liquor licensee on any charge set forth in Subsection (1), the director may take emergency action by immediately suspending the operation of the licensee according to the procedures and requirements of Title 63, Chapter 46b, for the period during which the criminal matter is being adjudicated.

(4) (a) (i) The commission may not grant an airport lounge liquor license to any person who has had any type of license, agency, or permit issued under this title revoked within the last three years.

(ii) The commission may not grant an airport lounge liquor license to any corporation or partnership applicant if any partner,

managing agent, officer, director, or stockholder who holds at least 20% of the total issued and outstanding stock of the applicant is or was a partner or managing agent of any partnership, or is or was a managing agent, officer, director, or a stockholder who holds or held at least 20% of the total issued and outstanding stock of any corporation that had a liquor license, agency, or permit revoked within the last three years.

(b) A corporation or partnership applicant may not be granted an airport lounge liquor license if any partner or managing agent of the partnership or any managing agent, officer, director, or stockholder who holds at least 20% of the total issued and outstanding stock of the corporate applicant had a liquor license, agency, or permit revoked while acting in their individual capacity within the last three years.

(c) A person acting in an individual capacity may not be granted an airport lounge liquor license if that person was a partner or managing agent of a partnership, or a managing agent, officer, director, or stockholder who held at least 20% of the total issued and outstanding stock of a corporation that had a liquor license, agency, or permit revoked within the last three years.

(5) A minor may not be granted an airport lounge liquor license.

(6) If any person to whom a license has been issued under this part no longer possesses the qualifications required by this title for obtaining that license, the commission may suspend or revoke that license.

32A-4-204. Commission and department duties before granting licenses.

(1) Before an airport lounge liquor license may be granted by the commission, the department shall conduct an investigation and may hold public hearings for the purpose of gathering information and making recommendations to the commission as to whether or not a license should be granted. This information shall be forwarded to the commission to aid in its determination.

(2) Before issuing an airport lounge liquor license, the commission shall:

(a) determine that the applicant has complied with all basic qualifications and requirements for making application for a license as provided by Sections 32A-4-202 and 32A-4-203, and that the application is complete;

(b) consider the applicant's ability to manage and operate an airport lounge liquor license including, but not limited to, management experience, past retail liquor experience, and the type of management scheme employed by the airport lounge;

(c) consider the nature or type of lounge operation of the proposed liquor licensee; and

(d) consider any other factors or circumstances it considers necessary.

32A-4-205. Bond.

(1) Each airport lounge liquor licensee shall post a cash or corporate surety bond in the penal sum of $10,000

payable to the department, which the licensee has procured and must maintain for so long as the licensee continues to operate as an airport lounge liquor licensee.

(2) The bond shall be in a form approved by the attorney general, conditioned upon the licensee's faithful compliance with this title and the rules of the commission.

(3) If the $10,000 surety bond is canceled due to the licensee's negligence, a $300 reinstatement fee may be assessed. No part of any cash or corporate bond so posted may be withdrawn during the period the license is in effect, or while revocation proceedings are pending against the licensee. A bond filed by a licensee may be forfeited if the license is finally revoked.

32A-4-206. Operational restrictions.

Each person granted an airport lounge liquor license and the employees and management personnel of the airport lounge shall comply with the following conditions and requirements. Failure to comply may result in a suspension or revocation of the license or other disciplinary action taken against individual employees or management personnel.

(1) Liquor may not be purchased by an airport lounge liquor licensee except from state stores or package agencies. Liquor purchased may be transported by the licensee from the place of purchase to the licensed premises. Payment for liquor shall be made in accordance with the rules established by the commission.

(2) An airport lounge liquor licensee may not sell or provide any primary liquor except in one ounce quantities dispensed through a calibrated metered dispensing system approved by the department in accordance with commission rules adopted under this title, except that:

(a) liquor need not be dispensed through a calibrated metered dispensing system if used as a secondary flavoring ingredient in a beverage subject to the following restrictions:

(i) the secondary ingredient may be dispensed only in conjunction with the purchase of a primary liquor;

(ii) the secondary ingredient is not the only liquor in the beverage;

(iii) the licensee shall designate a location where flavorings are stored on the floor plan provided to the department; and

(iv) all flavoring containers shall be plainly and conspicuously labeled "flavorings";

(b) wine may be served by the glass in quantities not exceeding five ounces per glass; and

(c) heavy beer may be served in original containers not exceeding one liter.

(3) (a) Airport lounges may sell beer in any size container not exceeding two liters, and on draft without obtaining a separate on-premise beer retailer license from the commission.

(b) Airport lounges that sell beer pursuant to Subsection (3)(a) shall comply with all appropriate operational restrictions under Chapter 10

that apply to on-premise beer retailers except when those restrictions are inconsistent with or less restrictive than the operational restrictions under this chapter that apply to airport lounges.

(c) Failure to comply with the operational restrictions under Chapter 10 as set forth in Subsection (3)(b) may result in a suspension or revocation of the airport lounge's state liquor license and its alcoholic beverage license issued by the local authority.

(4) Wine may be served in accordance with commission rule in containers not exceeding 750 ml.

(5) (a) Liquor may not be stored or sold in any place other than as designated in the licensee's application, unless the licensee first applies for and receives approval from the department for a change of location within the airport lounge.

(b) A patron or guest may only make purchases in the airport lounge from a server designated and trained by the licensee.

(c) Alcoholic beverages may not be stored where they are visible to persons outside the airport lounge.

(6) The liquor storage area shall remain locked at all times other than those hours and days when liquor sales are authorized by law.

(7) Alcoholic beverages may not be sold or offered for sale at an airport lounge during the following days or hours:

(a) on the day of any regular general election, regular primary election, or statewide special election until after the polls are closed; and

(b) on any other day after 12 midnight and before 8 a.m.

(8) Alcoholic beverages may not be sold, delivered, or furnished to any:

(a) minor;

(b) person actually, apparently, or obviously drunk;

(c) known habitual drunkard; or

(d) known interdicted person.

(9) Liquor may not be sold except at prices fixed by the commission. Mixed drinks and wine may not be sold at discount prices on any day or at any time.

(10) An airport lounge patron or guest may have only one alcoholic beverage at a time before him.

(11) No more than one ounce of primary liquor may be served to a patron or guest at a time, except wine as provided in Subsection (2)(b) and heavy beer as provided in Subsection (2)(c).

(12) Alcoholic beverages may not be purchased by the licensee, or any employee or agent of the licensee, for patrons or guests of the airport lounge.

(13) (a) Beginning January 1, 1991, a person may not bring onto the premises of an airport lounge licensee any alcoholic beverage for on-premise consumption.

(b) Beginning January 1, 1991, an airport lounge or its officers, managers, employees, or agents may not allow a person to bring onto the airport lounge premises any alcoholic beverage

for on-premise consumption or allow consumption of any such alcoholic beverage on its premises.

(c) Beginning January 1, 1991, if any airport lounge liquor licensee or any of its officers, managers, employees, or agents violates Subsection (13):

(i) the commission may immediately suspend or revoke the airport lounge's liquor license and the airport lounge liquor licensee is subject to criminal prosecution under Chapter 12; and

(ii) the local authority may immediately suspend or revoke the airport lounge's local liquor license, local consent under Subsection 32A-4-202(1)(c), or local business license.

(14) Alcoholic beverages purchased from the airport lounge may not be removed from the airport lounge premises.

(15) Minors may not be employed by an airport lounge licensee to sell or dispense alcoholic beverages.

(16) An employee of a licensee, while on duty, may not consume an alcoholic beverage or be under the influence of alcoholic beverages.

(17) Each airport lounge liquor licensee shall display in a prominent place in the airport lounge:

(a) the liquor license that is issued by the department;

(b) a list of the types and brand names of liquor being served through its calibrated metered dispensing system; and

(c) a sign in large letters stating: "Warning: The consumption of alcoholic beverages purchased in this establishment may be hazardous to your health and the safety of others."

(18) (a) Each airport lounge liquor licensee shall maintain an expense ledger or record showing in detail:

(i) quarterly expenditures made separately for malt or brewed beverages, liquor, and all other items required by the department; and

(ii) sales made separately for malt or brewed beverages, food, and all other items required by the department.

(b) This record shall be kept in a form approved by the department and shall be kept current for each three-month period. Each expenditure shall be supported by delivery tickets, invoices, receipted bills, canceled checks, petty cash vouchers, or other sustaining data or memoranda.

(19) Each airport lounge liquor licensee shall maintain accounting and other records and documents as the department may require. Any airport lounge or person acting for the airport lounge, who knowingly forges, falsifies, alters, cancels, destroys, conceals, or removes the entries in any of the books of account or other documents of the airport lounge required to be made, maintained, or preserved by this title or the rules of the commission for the purpose of deceiving the commission, council, or department, or any of their officials or employees, is subject to the immediate suspension or

revocation of the airport lounge's liquor license and possible criminal prosecution under Chapter 12.

(20) There shall be no transfer of an airport lounge liquor license from one location to another, without prior written approval of the commission.

(21) (a) A person, having been granted an airport lounge liquor license, may not sell, exchange, barter, give, or attempt in any way to dispose of the license whether for monetary gain or not.

(b) An airport lounge liquor license has no monetary value for the purpose of any type of disposition.

(22) Each server of alcoholic beverages in a licensee's establishment shall keep a written beverage tab for each table or group that orders or consumes alcoholic beverages on the premises. The beverage tab shall list the type and amount of alcoholic beverages ordered or consumed.

(23) An airport lounge liquor licensee's premises may not be leased for private functions.

(24) An airport lounge liquor licensee may not engage in or permit any form of gambling, as defined and proscribed by Title 76, Chapter 10, Part 11, Gambling, on the premises of the airport lounge liquor licensee.

32A-4-207. Return of inventory.

Any liquor previously purchased from the department that remains unsold and in saleable condition at the time the licensee's airport lounge liquor license becomes

invalid for any reason shall be returned to the department for a refund of the current value of the liquor or the liquor is subject to immediate seizure by the department.

TITLE 32A, CHAPTER 1, UTAH CODE ANN.

32A-1-105. Definitions.

(1) "Airport lounge" means a place of business licensed to sell alcoholic beverages, at retail, for consumption on its premises located at an international airport with a United States Customs office on its premises.

(2) "Alcoholic beverages" means "beer" and "liquor" as the terms are defined in this section.

(5) (a) "Beer retailer" means any business establishment engaged, primarily or incidentally, in the retail sale or distribution of beer to public patrons, whether for consumption on or off the establishment's premises, and that is licensed to sell beer by the commission, by a local authority, or both.

(b) (i) "On-premise beer retailer" means any beer retailer engaged, primarily or incidentally, in the sale or distribution of beer to public patrons for consumption on the beer retailer's premises.

(ii) "On-premise beer retailer" includes taverns.

(c) (i) "Tavern" means any business establishment engaged primarily in the retail sale or distribution of beer to public patrons for consumption on the establishment's premises, and that is licensed to sell beer under Chapter 10, part 2, On-Premise Beer Retailer Licenses.

(ii) "Tavern" includes a beer bar, parlor, lounge, cabaret, and night club where the revenue from the sale of beer exceeds the revenue of the sale of food, although food need not be sold in the establishment.

(10) "Club" and "private club" means any nonprofit corporation operating as a social club, recreational, fraternal, or athletic association, or kindred association organized primarily for the benefit of its stockholders or members.

(18) "Guest" means a person accompanied by an active member or visitor of a club who enjoys only those privileges derived from the host for the duration of the visit to the club.

(22) "Licensee" means any person issued a license by the commission to sell, manufacture, store, or allow consumption of alcoholic beverages on premises owned or controlled by the person.

(27) "Member" means a person who, after paying regular dues, has full privileges of a club under this title.

(31) "Package agency" means a retail liquor location operated under a contractual agreement with the department, by a person other than the state, who is authorized by the commission to sell package liquor for consumption off the premises of the agency.

(38) (a) "Privately-hosted event" or "private social function" means a specific social, business, or recreational event for which an entire room, area, or hall has been leased or rented, in advance by an identified group, and the event or function is limited in attendance to people

who have been specifically designated and their guests.

(b) "Privately-hosted event" and "private social function" does not include events or functions to which the general public is invited, whether for an admission fee or not.

(42) "Restaurant" means any business establishment:

(a) where a variety of foods is prepared and complete meals are served to the general public;

(b) located on a premises having adequate culinary fixtures for food preparation and dining accommodations; and

(c) that is engaged primarily in serving meals to the general public.

(50) (a) "State store" means a facility for the sale of package liquor located on premises owned or leased by the state and operated by state employees.

(b) "State store" does not apply to any licensee, permittee, or to package agencies.

(54) "Visitor" means a person holding limited privileges in a club by virtue of a visitor card purchased from the club and authorized by a sponsoring member of the club.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT I

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. [Citizenship – Due process of law – Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT XXI

Section 1. [Repeal of eighteenth amendment.]

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2. [Intoxicating liquors, shipment into dry territory prohibited.]

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. [Ratification, time limit.]

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Supreme Court, U.S.
FILED
APR 22 1996
CLERK

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No. 95-1533

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

MOOSE LODGE #259 (Salt Lake City) and
MOOSE LODGE #2103 (Tooele),

Petitioners,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of the State of Utah

BRIEF IN OPPOSITION

Frank D. Mylar
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QUESTIONS PRESENTED

1. Whether the Utah Civil Rights Act, which prohibits gender discrimination by private liquor clubs, is a rational exercise of state police power under the Twenty-first Amendment of the United States Constitution.

2. Whether a private liquor club's First Amendment right of free association is implicated when the club chooses to submit to intense state liquor regulations in exchange for becoming a market participant in the state liquor industry.

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On Petition for Writ of Certiorari
To the Supreme Court of the State of Utah

BRIEF IN OPPOSITION

Respondent, Utah Department of Alcoholic Beverage Control, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the opinion of the Supreme Court of the State of Utah on October 23, 1995.

STATEMENT OF FACTS

Only a finite number of restaurants and private clubs are granted the privilege of selling liquor in Utah. Such liquor licensees must purchase all alcoholic beverages from the state. Private liquor clubs, like licensed restaurants, must make certain quantities of food available to members or guests who wish to purchase alcohol.

The State of Utah has one of the most extensive liquor regulatory schemes in the country. Strict regulations govern the location, time of day, and means by which all forms of alcohol may be sold or served at private liquor clubs and restaurants. All liquor licensees are subject to unannounced searches of their premises to ensure compliance with the Utah Alcoholic Beverage Control Act (UABC), Chapter 32A of the Utah Code. Sexually provocative entertainment, acts, or dress is strictly prohibited. The Alcoholic Beverage Control Commission (The Commission) must approve the articles of incorporation and by-laws before a liquor license may be issued. Amendments to by-laws or articles of incorporation are invalid unless submitted to the Commission for approval within ten days. Public restaurant liquor licensees are subjected to equally rigorous restrictions. Contrary to the Moose's implication (Moose Petition, p. 4), neither public nor private liquor licensees may advertise alcoholic beverages to the public. Utah Code Ann. §§ 32A-4-106(21) and -5-107(23).

Private liquor clubs are non-profit corporations incorporated for the purpose of obtaining a liquor

license to store, sell, serve, or consume liquor. (App. 82-83). Liquor clubs may not be used for gambling or any other violation of law or ordinance. All liquor licensees are also subject to the gender discrimination prohibitions in the Utah Civil Rights Act (UCRA), Utah Code Ann. §§ 13-7-1 through -4 (1992). All private liquor clubs are considered "enterprises regulated by the state" under Utah law and as such acquire a "quasi-public status whenever engaged in the buying or selling of alcohol." (App. 23).

Petitioners are Moose Lodges which hold private club liquor licenses under Utah Code Ann. §§ 32A-5-101 through -108 (1991 and Supp. 1993). Under state law, the Moose are no different than any other private eating and drinking club with the notable exception that their by-laws prohibit women from becoming members of their private liquor clubs or "Social Quarters."

Aside from the by-laws and club rules, however, the Moose in practice do not allow women to become members of their private liquor clubs. Therefore, they cannot become officers, directors, or exercise legal authority over the liquor club business. Females may appear only as "qualified guests" in the liquor club (Social Quarters), thus prohibiting women from bringing male or female friends as guests as is necessary when socializing for professional or personal reasons. On the other hand, males and females freely associate with each others during regular business hours of the liquor club.

The Commission's interest in the Moose extends only to the use of state liquor licenses on the premises of their liquor club or social quarters. The Commission is

not concerned with meetings or activities outside the liquor club (Social Quarters). Utah law declares that gender discrimination in private liquor clubs endangers the health, safety, and general welfare of the state and its inhabitants and violates state public policy. The Commission is charged by statute to protect the public interest and the public health, peace, safety, welfare, and morals. In furtherance of this duty, the Commission issued a directive requiring all private club liquor licensees to attest to the Department of Alcoholic Beverage Control (The Department) that they do not discriminate on the basis of race, sex, or religion and that their by-laws, constitutions, or articles of incorporation do not contain discriminatory language. The Commission further directed that the licenses of all private clubs who failed to comply with this directive would be revoked. This directive has the force of law and served to clarify and notify all private clubs regarding their duty to abide by the provisions of the Utah Civil Rights Act (UCRA).

In response to the Commission's directive, some private clubs changed their by-laws to eliminate unlawful discrimination while several Elks Lodges surrendered their liquor licenses and set up new private liquor clubs on the premises where the Elks' liquor clubs previously existed. Without the liquor license, these Elks Lodges are free to discriminate on the basis of race, sex, and religion.

The Moose failed to comply with the Commission's directive in that they failed to sign unequivocal attestations that they do not discriminate and they failed to remove discriminatory language from their by-laws and rules. After an evidentiary hearing,

the Commission found that the Moose discriminate against women by denying full and equal accommodations, advantages, facilities, privileges, goods, and services on the basis of gender. The Commission further found that the practice of gender discrimination endangers the public health, welfare, safety, and general welfare of this state and its inhabitants and violates the public policy of this state and that the purposes of Utah liquor laws are the protection of the public health, peace, safety, welfare, and morals. The Commission finally found that the By-Laws, Constitution, and operation of the Lodges are not consistent with the purposes of the ABCA. (App. 63-64).

SUMMARY OF ARGUMENT

This case involves a state liquor regulation which prohibits discrimination based upon race, sex, or religion in the limited number of corporations privileged to sell and serve liquor on behalf of the State of Utah. The case has little significance outside of Utah in that the ruling is based upon liquor regulations and civil rights laws unique to Utah. The decision does not create a conflict in federal law with other appellate courts.

All claims asserted by the Moose were resolved several years ago by decisions of this court. In *California v. LaRue*, 409 U.S. 109 (1972) and later in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), this court ruled that states have the authority to place significant restrictions on First Amendment rights by curtailing certain forms of entertainment in state-licensed liquor clubs. Restrictions on the sale of liquor which are not

"irrational or unreasonable" must be upheld as a valid exercise of a state's power under the Twenty-first Amendment.

This court further decided several years ago that states have a compelling interest "of the highest order" to prevent sex discrimination in large social organizations. See *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). This court ruled that First Amendment association rights of large social clubs must give way to the state's interest in preventing discrimination. This is not to say that the prevention of gender discrimination should always override the association rights of all organizations. However, since the Moose constantly associate with women guests during all liquor club hours while eating meals and attending social events, like the Jaycees and Rotary, very little association rights are implicated.

The Utah Supreme Court's decision in this case, is much more compelling than the facts of *LaRue*, *Bellanca*, *Rotary Club*, or *Roberts* since it deals with a state's authority to regulate alcohol under the Twenty-first Amendment and its police power to prevent sex discrimination among its liquor retailers. By using its powers under the Twenty-first Amendment to prevent discrimination based upon race, sex, or religion in state-licensed liquor establishments, the state's actions in this case fall within the realm of acceptable state authority under existing Supreme Court precedents.

The Commission's directive prohibiting discrimination and requiring non-discriminatory language in the by-laws of private club liquor licensees

provided sufficient specificity and clarity to eliminate any claims of vagueness or overbreadth as applied to the Moose. Moreover, the UCRA, as interpreted by *Beynon v. St. George-Dixie Lodge # 1743*, 854 P.2d 513 (Utah), cert. denied, 114 S.Ct. 195 (1993), explicitly prohibits discrimination in all private liquor clubs. Therefore, the suspension of the Moose liquor licenses for sex discrimination did not deprive the Moose of any federal right.

Utah has a strong tradition of closely regulating and monitoring alcohol sales and consumption based upon its general police powers to protect the public health, peace, safety, welfare, and morals. It is also Utah State policy to prevent discrimination among its limited number of liquor licensees. The Twenty-first Amendment allows states more power than the normal police powers to strictly regulate the liquor industry. Prohibiting discrimination and violations of Commission directives among liquor licensees are legitimate police actions between a state and its liquor retailers.

The Moose cite many cases to support their claim that the UCRA and the ABCA are unconstitutional. However, none of the cases cited by the Moose deal specifically with a state liquor regulation prohibiting gender discrimination in a private club pursuant to the state's police powers under the Twenty-first Amendment. Such facts are crucial in determining the applicable standard for constitutional review.

REASONS FOR DENYING THE PETITION

POINT I

NO IMPORTANT FEDERAL ISSUE IS PRESENTED BY THE MOOSE

The Utah Supreme Court's decision was based solely upon Utah's unique tradition of strictly regulating all aspects of the sale, service, and storage of alcoholic beverages. This regulatory scheme has spawned a limited number of restaurant-type drinking and eating clubs where persons can drink alcoholic beverages while socializing. These social drinking establishments are classified as private liquor clubs. See Utah Code Ann. §§ 32A-5-101 to -108 (1991 and Supp. 1993).

By statute, the Commission may authorize a finite number of private club liquor licenses. It therefore has a duty to ensure that over half of the eligible drinking population is not arbitrarily excluded from drinking, socializing, and fostering business opportunities at private liquor clubs. Under Utah law, the Moose, as private club liquor licensees, are indistinguishable from other drinking and eating clubs which by law must be private, non-profit corporations. The major reason for these private club regulations is to discourage and control the consumption of alcoholic beverages. Few, if any, other states have substantially similar private liquor clubs.

The decision of the Utah Supreme Court will have virtually no impact on other states in that Utah's liquor control and civil rights statutes are unique to Utah. The Moose cannot cite any holdings of other State Supreme

Courts or Circuit Courts of Appeals which conflict with this Utah decision. The issues presented by the Moose do not involve an "important question of federal law which has not been, but should be settled by this Court." Sup. Ct. R. 10.1(c). To the contrary, the Utah Supreme Court's decision falls clearly within the limits of the decisions of this court dealing with a state's power to regulate liquor under the Twenty-first Amendment and its compelling interest in preventing gender discrimination in large social and business organizations.

POINT II

UTAH'S LIQUOR REGULATIONS, WHICH PROHIBIT DISCRIMINATION BASED ON RACE, SEX, AND RELIGION, DO NOT VIOLATE THE LIMITED ASSOCIATION RIGHTS OF THE MOOSE

This court ruled several years ago in *California v. LaRue*, 409 U.S. 109 (1972) and later in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), that states have the authority to place significant restrictions on First Amendment rights by curtailing certain forms of entertainment in state-licensed liquor clubs. The Moose virtually ignore these precedents citing mainly to cases dealing with state action, the boy scouts, or private parades which have little relevance to the liquor regulations at issue in this case. The Moose's claims regarding "unconstitutional conditions" and association rights stem from the same issue of to what extent a state may regulate its liquor industry. The prohibition against race, sex, and religious discrimination in Utah's liquor establishments, is a rational exercise of power

delegated to the state under the Twenty-first Amendment.

The Twenty-first Amendment allows states even more power than the normal police powers to strictly regulate all aspects of the liquor industry. *California v. LaRue*, 409 U.S. at 114. A state liquor regulation will be upheld, unless it is "irrational or unreasonable." Id. at 116. Moreover, a "presumption in favor of the validity" of a state liquor regulation is mandated by the Twenty-first Amendment. Id. at 118. "Wide latitude" must be given to the state agency that is the repository of the state's power under the Twenty-first Amendment. Id. at 116. Since the civil rights statute at issue in this case is a state restriction on the liquor industry, the state need not show a compelling interest or state action under the Fourteenth Amendment to justify its actions.

The Utah Legislature enacted a significant regulatory scheme to closely monitor all aspects of the liquor industry. "Citizens in Utah may purchase liquor only through state liquor stores (where no consumption is allowed), at licensed private clubs, or at licensed restaurants." (App. 22). The Commission is empowered by the Legislature to set the price and all policies and procedures relating to the purchase, sale, inventory, and storage of liquor. Utah Code Ann. § 32A-1-107. The state is an active market participant as a purchaser and wholesaler. The Moose, "by voluntarily applying for a liquor license, have agreed to become one of the relatively few organizations in [Utah] allowed to dispense liquor." (App. 23).

To obtain a private club liquor license, a non-profit corporation must meet numerous requirements.

For example, the club may not be used for gambling or any other violation of law or ordinance. Utah Code Ann. § 32A-5-105(2)(c). In addition, all liquor licensees are "enterprises regulated by the state" and subject to the anti-discrimination provisions of the UCRA. See, *Beynon*, 854 P.2d at 517-519. The Moose failed to show, or even raise the issue, that these regulations are "irrational and unreasonable" as required to invalidate a liquor regulation under the Twenty-first Amendment. See *LaRue*, 409 U.S. at 116.

Apart from regulating liquor, all states have the right, and sometimes the duty, to prohibit discrimination based upon race, sex, and religion. In fact, this Court ruled that prohibiting gender discrimination "plainly serves compelling state interests of the highest order." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In *United States Jaycees*, the Court held that the state's exercise of its police powers to prohibit gender discrimination outweighed First Amendment claims of freedom of association.

In this case, the Department relies upon not only its significant powers under the Twenty-first Amendment, but also its exercise of its police powers to prevent discrimination as an additional regulation on liquor licensees. These two separate grounds for state power combine together to defeat the Moose's claimed violation of their right of free association. Although their freedom of association claim is inapplicable because the Moose already associate with women during all business hours of the liquor club and could freely discriminate if they opted out of the liquor industry by surrendering their liquor licenses, even if they possessed significant association rights, the state's ability to

strictly regulate the liquor industry and its compelling state interest in preventing discrimination far outweighs any association rights of the Moose.

For years Moose members have regularly associated with women in the liquor club in that wives and female guests of members frequent the Lodge's drinking and eating place. They further voluntarily submitted to intense state regulation of the Social Quarters when they chose to become part of the state liquor industry by accepting the responsibilities and privileges of a state private club liquor license.

Under the UCRA, the Moose are considered "enterprises regulated by the state." Utah Code Ann. § 13-7-3(b) (1992); See also *Beynon*, 854 P.2d 517-519. Moreover, the Moose acquired a "quasi-public status whenever they engage in the buying and selling of alcohol" under Utah law. (App. 23). The Moose therefore, as private club liquor licensees, possess little, if any, association rights to discriminate on the basis of race, sex, or religion in their state liquor club.

Petitioners automatically assume that the First Amendment protects at all costs any possible freedom of association claim. However, case law does not support such a theory when liquor laws are combined with anti-discrimination laws.

If the Moose and Elks had a valid free association claim, the state's ability to strictly regulate liquor combined with its compelling interest to prohibit gender discrimination would override such rights. In the liquor control context, the state need only show that the liquor regulations are not unreasonable or irrational. See,

California v. LaRue, 409 U.S. at 116. The Moose failed to introduce any evidence at the lower stages of these proceedings which show that the civil rights liquor regulations are irrational and unreasonable. To the contrary, this Court acknowledged the need for such regulations even outside the liquor control context. See *Roberts*, 468 U.S. at 609.

Given the backdrop of an extremely limited measure of privacy enjoyed by Moose members, the state's power to strictly regulate the liquor industry, and the state's compelling interest to prevent discrimination, any association interests asserted by the Moose must fail. Buying, selling, and consuming liquor is a state privilege and not a constitutional right. Petitioners may not "reap the benefits of a liquor license without complying with the substantial responsibilities accompanying that license." *Beynon*, 854 P.2d 518.

POINT III

THE UTAH LIQUOR COMMISSION'S ACTION IN SUSPENDING THE MOOSE LIQUOR LICENSES FOR SEX DISCRIMINATION DID NOT DEPRIVE THE MOOSE OF A CONSTITUTIONAL RIGHT

The Moose focus on one of the three bases upon which the Commission relied to suspend their liquor licenses. Specifically they claim the state law requiring private liquor clubs to refrain from "gambling or any other violation of law or ordinance" is either over broad or vague. See Utah Code Ann. § 32A-5-105(2)(c) (1991). The Moose ignore the fact that the Utah Civil Rights Act explicitly prohibits gender discrimination in

private clubs and that the Commission issued a directive which further serves to clarify and notify the Moose of what the law and the Commission required. These facts alone preclude vagueness and over broad arguments as applied to the Moose. However, nothing in the wording "or any other violation of law or ordinance" is vague or overly broad.

Even the Twenty-first Amendment mandates compliance with all Utah liquor laws mandating: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is hereby prohibited." U.S. Const. Amend. XXI, § 2. This amendment references similar wording of obeying all state laws, without specifying which laws must be obeyed. Therefore, Utah Code Ann. § 32A-5-105(2)(c) merely reflects what the Twenty-first Amendment already requires.

The first inquiry in an overbreadth challenge is to determine whether the enactment prohibits a substantial amount of constitutional protected activity. If it does not, the challenge will fail. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 489. The overbreadth doctrine is a "prophylactic concept applicable only to First Amendment claims." *Stites v. I.R.S.*, 793 F.2d 618, 620 (5th Cir. 1986). The doctrine does not apply to commercial speech. *Village of Hoffman Estates*, 455 U.S. at 497.

In this case, Utah Code Ann. § 32A-5-105(2)(c) prohibits liquor licensees from using their club to violate any state law. Since no protected First

Amendment activities are implicated by the wording, the challenge must fail.

Second, the statute is not vague. No reasonable person could arrive at a different interpretation. Furthermore, if the activity in question, as applied, is clearly proscribed, the law cannot be considered vague. Id. at 495. In this case, both the UCRA and the Commission's Directive clearly proscribe discriminatory conduct in the operation of private liquor clubs. They cannot now complain that they did not know they should not discriminate in the operation of their liquor club. Since the Moose had "fair warning" through the UCRA and the Commission's anti-discrimination directive, the liquor regulations, when taken as a whole, cannot be vague. *Id.* at 503.

Petitioners bear the burden of proving that the law is vague in all its application to the Moose, contrary to the holding of the *Atlanta Attractions, Inc. v. Massell*, 330 F.Supp. 865 (N.D. Georgia 1971), aff'd, 463 F.2d 449 (5th Cir.1972), relied upon by Petitioners, which incorrectly shifts the burden to the state to defend against all sorts of unusual applications. The fact that some unconstitutional applications can be "imagined" is insufficient to invalidate a state law. *Murphy v. Matheson*, 742 F.2d 564 (10th Cir. 1984).

CONCLUSION

The Moose petition does not present an important issue of federal law. The Utah Supreme Court's decision in this case is solely the product of a highly regulated liquor industry unique to Utah. The lower decision is consistent with precedents of this court which address a state's right to control all aspects of the alcoholic beverage industry. The anti-discrimination provisions of Utah law are explicit and constitute a rational exercise of state authority under the Twenty-first Amendment. Therefore, no reason exists to grant the petition for certiorari.

RESPECTFULLY SUBMITTED this 22nd day of April, 1996.

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